



A TREATISE
ON THE
LAW OF TAXATION

INCLUDING
THE LAW OF LOCAL ASSESSMENTS

BY THOMAS M. COOLEY, LL. D.
LATE CHIEF JUSTICE OF THE SUPREME COURT OF MICHIGAN AND PROFESSOR OF
CONSTITUTIONAL LAW AND POLITICAL SCIENCE IN THE
UNIVERSITY OF MICHIGAN.

THIRD EDITION

BY
ALBERT POOLE JACOBS
OF THE DETROIT BAR

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LAW OF TAXATION.

CHAPTER XIV.

THE COLLECTION OF THE TAX.

Where taxes have been levied and assessed they are to be collected after some method prescribed by law. The collection is not an element of the assessment, but is subsequent in time and assumes a valid tax.¹

Notice to taxpayers. It is not usual to require that each individual taxpayer be notified of the amount of his tax; but where the law makes such requirement, it must be followed.² A statute directing tax-collectors to send to known owners of non-resident property bills of their taxes is mandatory.³

¹ *Pensacola v. Sullivan*, 23 Fla. 1.

² *Olsen v. Bagley*, 10 Utah 492. Notice to one only of two joint owners is not sufficient. *Asper v. Moon* (Utah), 67 Pac. Rep. 409. Although the statute provides that where a tax is claimed on omitted property the county commissioners shall give the owner five days' notice, yet where the owner appeared and defended the proceeding before the commissioners he could not complain of their failure to give such notice: *Calhoun County v. Woodstock Iron Co.*, 82 Ala. 151.

³ *Davis v. Sawyer*, 66 N. H. 34. A tax-bill was held sufficiently specific which gave the amount of the taxpayer's list whereon was certified the rate per cent. of each tax included therein: *Hughes v. Kelley*, 69 Vt. 443. Where the tax-bill showed that the tax claimed was the school tax for a certain year against lot 43, block 7, old town of Pacific, Franklin county, it could not be excluded as evidence because not showing the

number of the school-district, township, and range: *State v. Rau*, 93 Mo. 126. See also as to description, *State v. Cowgill*, 81 Mo. 381. In Vermont a tax-sale was not rendered void because the rate-bill issued to the collector did not correctly contain the original proprietor's name: *Wells v. Austin*, 57 Vt. 157. As to the heads under which the valuation of property is to be extended in tax-bills, see *Louisville Bridge Co. v. Louisville* (Ky.), 58 S. W. Rep. 828. As to the signing of tax-bills, see *Textor v. Shipley*, 86 Md. 424; *Eyerma v. Payne*, 28 Mo. App. 72; *Heman v. McLaren*, 28 Mo. App. 654. The Vermont statute providing that the selectmen shall make and deliver to the treasurer all tax-bills required by law to be made and verified by them does not impliedly require them to verify tax-bills, no previous law having required it: *Wilmot v. Lathrop*, 67 Vt. 671. And a statute requiring selectmen to certify on each tax-bill made out by them what

Payment of tax. Unless prescribed by statute the time when taxes are to be paid must be fixed by notice or otherwise.¹ A provision that the officer to whom taxes are to be paid shall attend at a designated place until a given date to receive them is mandatory.²

Who may pay. The persons who, besides the owner, would be entitled to make payment, would include any who may have been assessed for the tax, and any others whose interests would be affected injuriously by a sale, either because of liens they may have, or of contract relations;³ and any one

taxes are included therein and the rate per cent. of each, is satisfied by a bill from which, by inspection and computation, all the information that the certificate was required to give can readily be obtained, although it contains no certificate at all: *Buchanan v. Cook*, 70 Vt. 168.

¹ Municipal tax held not delinquent, and action to recover it held not maintainable until time when it should be paid had been fixed by ordinance: *Dixon v. Mayes*, 72 Cal. 166. It being the treasurer's duty to give notice that the duplicate assessment roll was in his hands and of the date when the taxes must be paid, the county records must show that some notice was given, even though no statute required proof of notice to be preserved: *Vestal v. Morris*, 11 Wash. 451. As to when a tax is due in Ohio, see *Hoglen v. Cohan*, 30 Ohio St. 436. Where a statute provided that "all taxes shall be due on the first Monday in September in each year," but that the tax-collector shall attend at the court-house or in his county town during the months of September and November for the purpose of receiving taxes, and that nothing in the act shall prevent the officer from levying and selling after the first day of November, but he shall not sell before that day, the taxpayer may pay his taxes at any time until the last day of November with-

out incurring any penalty: *State v. Bryant*, 121 N. C. 569.

² *Hare v. Carnall*, 39 Ark. 196. As to place of payment of license taxes on several breweries conducted by one receiver, see *Metropolitan Bank v. New Orleans Brewing Assoc.*, 49 La. Ann. 1.

³ See *Martin v. Snowden*, 18 Grat. 100, 9 Wall. 326; *Tacey v. Irwin*, 18 Wall. 549. As to what is such color of title, or such good-faith claim of title, as to give one a right to pay taxes, and, consequently, to be compensated, see *Kemp v. Cossart*, 47 Ark. 62; *Thompson v. Savage*, 47 Iowa 522; *Goodnow v. Moulton*, 51 Iowa 555; *American Emig. Co. v. Land Co.*, 52 Iowa 323; *Goodnow v. Wells*, 54 Iowa 326; *Goodnow v. Litchfield*, 63 Iowa 275, 67 Iowa 691; *Bradley v. Cole*, 67 Iowa 650; *Goodnow v. Burrows*, 74 Iowa 256; *Goodnow v. Wells*, 78 Iowa 760; *Merrill v. Tobin*, 82 Iowa 529; *Crawford v. Galloway*, 29 Neb. 261; *Carter v. Brown*, 35 Neb. 670; *Brown v. Day*, 78 Pa. St. 129. In Washington a general judgment lien entitles the holder to pay taxes and have a lien therefor: *Packwood v. Briggs*, 25 Wash. 530. The Kentucky statute providing that one who has a lien upon property whereon the taxes are unpaid may be subrogated to the state's lien does not empower the lien-holder to pay all taxes of the owner and be subrogated to a lien

having the right may depute another to make it for him.¹ Whether any third person may make payment is not so clear; but as the state is interested only in obtaining the revenue it has called for, it would seem that, before any sale, and consequently before any rights of third parties have intervened, any mere volunteer may pay the tax if he chooses; and the payment would be effectual, so far, at least, as to terminate the lien of the tax upon the land;² though if the statute undertook to give the person making the payment rights in the land by reason thereof, the payment might not be effectual to confer such rights; for no one can assume to stand in the place of the owner for the purpose of performing an act which the owner himself sees fit not to perform, and claim thereby to establish rights against the owner or his property by what, under such circumstances, would be an officious intermeddling. It has therefore been held that the lien which the statute gives to one who pays a tax on land attaches only in case the person paying had an interest, either personally or as agent;³ though if he were a mere intermeddler, and the owner should

on property not carried by his own lien: *Allen v. Perrine*, 103 Ky. 516. Under the Oregon statute the holder of a lien can pay the taxes assessed on the land without paying all other taxes assessed against the owner, such payment releasing the land: *McNary v. Wrightman*, 32 Oreg. 573. Where a person who has been adjudged to be the owner of lands is awarded the rents for years during which such lands were held by another, less the taxes paid by the latter, the fact that the taxes were previously paid by a third person is immaterial to him: *Greer v. Turner*, 47 Ark. 17. Where one has paid taxes he need not have paid—the land not being taxable—he cannot, in a suit to quiet title, require them to be refunded: *Hays v. McCormick*, 83 Iowa 89. Taxes paid by persons during possession of premises may be set off against mesne profits: *McLay v. Arnett*, 47 Ark. 445.

¹ *State v. Law*, 46 W. Va. 451. An agent has a right to pay taxes for his

principal, and if tax officers adopt a rule that they will not receive taxes from an agent, this excuses the agent from making tender: *Atwood v. Weems*, 99 U. S. 183; *Hills v. Exchange Bank*, 105 U. S. 319; *United States v. Lee*, 106 U. S. 196. It is held in *Hawkins v. Dougherty*, 9 *Houst. (Del.)* 156, that a tax-collector cannot be compelled to receive taxes from the hands of an agent or attorney in fact.

² See *Kinsworthy v. Austin*, 23 Ark. 375; *State v. Johnson*, 30 Fla. 499; *Reading v. Finney*, 73 Pa. St. 467; *Martin v. Snowden*, 18 *Grat.* 100. The fact that a statute makes default in payment of poll-taxes a misdemeanor will not prevent the collector from accepting voluntary payment of delinquent poll-taxes with penalties: *State v. Falk*, 45 S. C. 491.

³ *Peay v. Field*, 30 Ark. 600; *Iowa R. Land Co. v. Davis*, 102 Iowa 128; *Griffin v. Pintard*, 25 *Miss.* 173; *Hahn v. Mosely*, 119 N. C. 73; *In re Wallace's Estate*, 59 Pa. St. 401;

subsequently claim the benefit of the payment, there would be no injustice in holding that he thereby adopted the act of payment with all the statutory consequences.¹ The officer who received the payment would himself be precluded from raising any question of its sufficiency.²

What receivable in payment. A tax-collector has not authority to receive in payment of taxes anything but such money as at the time is legal tender, or at least passes current.³ He has no right to receive the promissory notes of individuals, and such notes, if so received, do not operate as payment or discharge the tax, and are void as without consideration and contrary to public policy.⁴

Hinchman v. Morris, 29 W. Va. 673. A husband who voluntarily and without a contract for repayment paystaxes on land conveyed by him to his wife cannot recover them back: *Doughty v. Miller*, 50 N. J. Eq. 529. A tenant-in-common who paid the tax assessed in one sum on land owned by her and others in common, when she might have had her interest taxed separately, was denied a lien for reimbursement: *Preston v. Wright*, 81 Me. 306. And a mortgagee of an undivided interest in land who pays the taxes on the whole tract when he could pay his proportionate share is a volunteer, and cannot subject the whole tract to a lien for the taxes so paid: *Koehler v. Hughes*, 4 Misc. Rep. 236, 24 N. Y. Supp. 760.

¹ *Goodnow v. Stryker*, 61 Iowa 261.

² *Iowa, etc. Co. v. Guthrie*, 53 Iowa 383.

³ *Richards v. Stogsdel*, 21 Ind. 74; *Staley v. Columbus*, 36 Mich. 38; *People v. Seeley*, 117 Mich. 263; *McLanahan v. Syracuse*, 18 Hun 259. As to the right of payment in bonds or coupons, see *ante*, pp. 119, 120; *Norfolk Trust Co. v. Maryee*, 25 Fed. Rep. 654; *Willis v. Miller*, 29 Fed. Rep. 238; *Wynn v. Stone*, 69 Miss. 80; *Bummel v. Houston*, 68 Tex. 10; *Greenhow v. Vashon*, 81 Va. 336; *Commonwealth v. Ford*, 89 Va. 427;

Commonwealth v. Dunlop, 89 Va. 431. Payment in city or county warrants: *United States v. Macon County Court*, 45 Fed. Rep. 400; *Preston v. McNamara*, 73 Cal. 236; *Fuller v. Heath*, 89 Ill. 296; *Reynolds v. Norman*, 114 Mo. 509; *Kansas City, Ft. S. & M. R. Co. v. Thornton*, 152 Mo. 570; *Western Town Lot Co. v. Lane*, 7 S. D. 599; *Pelton v. Crawford County Supervisors*, 10 Wis. 69.

⁴ *Dickson v. Gamble*, 16 Fla. 687; *Pettyjohn v. Liebscher*, 92 Ga. 149; *Vanmeter v. Spurrier*, 94 Ky. 22; *Embden v. Bunker*, 86 Me. 313; *Doran v. Phillips*, 47 Mich. 229; *Turnbull v. Alpena*, 74 Mich. 621; *Hatch v. Reid*, 112 Mich. 430; *Wyatt v. Jackson*, 55 Minn. 87; *McWilliamis v. Phillips*, 51 Miss. 196; *Schroeder v. Nielson*, 39 Neb. 335; *Kerner v. Boston Cottage Co.*, 123 N. C. 294. A liquor license issued upon taking the licensee's notes for the fee is void: *Zgielke v. State*, 42 Neb. 750. Since a county treasurer has no authority to receive a draft in payment of taxes, where a draft is sent for the purpose, if payment is refused by the drawee, the treasurer may, even after having issued a tax receipt, and marked the taxes "paid" on the tax-roll, proceed to collect the taxes from the lands against which they are charged: *Barnard v. Mercer*, 54

A bank-cheque is conditional payment only, and the tax will remain in force if the cheque is dishonored.¹ But a collector who accounts for a tax in his return, on the promise of the person liable that he will pay him, may recover on the promise,² and perhaps even on an implied promise if the tax was a personal demand.³ In some states by statute the collector is allowed to account for the tax himself, and then make use of the state's process to compel payment.⁴ In other states he is

Kan. 630. Where the township treasurer took worthless orders in payment of a tax, and the township received them from him and then brought suit against the person taxed, but the statute only provided for suit in case a personal tax could not be collected, the suit was not maintainable: *Staley v. Columbus*, 36 Mich. 38. It was held in *Hatch v. Reid*, *supra*, that although a county treasurer cannot accept a note given directly in payment of a tax, he violates no public trust by making a loan of his private funds and applying the loan in payment of the borrower's taxes. In Maine a town has no power to direct an assessment of a tax for the purpose of reimbursing a tax-collector who has taken a note for certain taxes and accounted therefor to the town as money and is thereafter unable to collect the note: *Thorndike v. Camden*, 82 Me. 39.

¹ *Koones v. District of Columbia*, 4 Mackey 329; *Houghton v. Boston*, 159 Mass. 138; *Moore v. Auditor-General*, 122 Mich. 599; *Kahl v. Love*, 37 N. J. L. 5. See *Johns v. McKibben*, 156 Ill. 71. And this even although a receipt was given at the time in reliance upon which a person has bought the land: *Kahl v. Love*, *supra*. See *Alkan v. Bean*, 8 Biss. 83. If a tax-collector accepts a cheque in payment of taxes, and afterwards receives the money thereon, such receipt operates as a payment of the tax: *Richards v. Hatfield*, 40 Neb. 879. Where a county treasurer de-

posits in a bank receipts for the bank's taxes, receives credit for the amount of such taxes, and afterwards draws out the money by cheque, the transaction amounts to a payment of the taxes: *Wasson v. Lamb*, 120 Ind. 514. The original owner of lands sold to the state for taxes cannot object that a cheque was given to the auditor-general by a third person purchasing such lands: *Hubbard v. Auditor-General*, 120 Mich. 505. The fact that a cheque paid to a sheriff for taxes on railroad property was used in paying a debt he owed to the railroad's attorney does not relieve his sureties from liability: *Combs v. Breathitt County (Ky.)*, 46 S. W. Rep. 505. A county treasurer who has accepted a cheque in payment of taxes is not entitled, when it is not paid, to be subrogated to the state's lien so as to secure priority over an earlier mortgage: *Mercantile Trust Co. v. Hart*, 76 Fed. Rep. 673, citing *Griffin v. Pintard*, 25 Miss. 173; *Hinchman v. Morris*, 29 W. Va. 673.

² *Elson v. Spraker*, 100 Ind. 374.

³ See *McCracken v. Elder*, 34 Pa. St. 239; *Shriver v. Cowell*, 92 Pa. St. 262; *Pontiac v. Axford*, 49 Mich. 69. Compare *Wallace's Estate*, 59 Pa. St. 400; *Dickson v. Gamble*, 16 Fla. 687.

⁴ See *Jacks v. Dyer*, 31 Ark. 334. But in such case the process would not be free from judicial interference under a statute making it so in the first instance: *White v. State*, 51 Ga. 252. It is held in *Page v. Claggett (N. H.)*, 51 Atl. Rep. 686, that an

simply allowed to bring suit against the person who should have paid.¹

Part payment; payment in instalments. A county which has authority to sue for taxes has authority to compromise and receive less than the whole; and if it shall do so and then proceed to collect, the proceedings will be enjoined.² But it is no excuse for failure to pay a tax in full that the collector, without authority, and of his motion, has remitted a part of the tax.³ Unless directed by statute the collector is not obliged to take payment of a given tax in instalments.⁴

agreement between a town and its collector that tax-warrants shall continue in force after the collector has paid the tax in full and until the taxes are collected of the taxpayers, is unauthorized and void, being nothing more or less than an agreement that the collector shall have the benefit of the warrant for the purpose of enforcing reimbursement. Payments made by the collector to the town are inoperative, and a property owner who has not paid his taxes continues liable.

¹ Where the statute authorizes a collector to bring suit to recover a tax charged to him in his settlement he cannot do so by way of enforcing a lien, for the lien is gone when he settles for the tax; and he can only recover a personal judgment: *Schaum v. Showers*, 49 Ind. 285.

² *St. Louis, etc. R. Co. v. Anthony*, 73 Mo. 431, citing *Supervisors v. Bird-sall*, 4 Wend. 453; *Supervisors v. Bowen*, 4 Lans. 31.

³ *New Orleans v. Meister*, 33 La. An. 646.

⁴ *Sayers v. O'Connor*, 124 Mich. 256. In this case a taxpayer paid part of the tax, which, on his inability to pay the rest before the expiration of the time limited, was returned; and it was held that such payment did not affect the state's right to sell the land for the entire tax. Where the

owner of various tracts of land gave the tax-collector part of the total tax, intending to pay the rest in county warrants, which he afterwards did, it was decided that the taxes on none of his land were paid by him until his final settlement with the collector: *Osburn v. Searles*, 156 Ill. 88. In Kansas it has been held that the owner of three quarter-sections of land which have been assessed and taxed as entire and complete quarter-sections cannot pay taxes on an undivided half of each; nor can the county treasurer sell such undivided interest for delinquent taxes: *Auld v. McAllaster*, 43 Kan. 162. While the law in Louisiana recognizes and permits partial payments on taxes, it must be upon a reasonable showing made and some reasonable basis of calculation adopted. The tax debtor may not arbitrarily select a given sum out of the total amount of taxes the rolls show he owes, and expect the tax-collector to receive it as a partial payment. The collector would rightly refuse such payment and proceed to enforce collection of the whole amount with penalties added: *Liquidating Com'rs v. Tax-Collector*, 106 La. 130. Under the Michigan statute a taxpayer believing only a part of its tax valid may pay that part and contest the rest: *Chapin Mining Co. v. Uddenberg*, 126 Mich. 375. Under the Nevada statute a tax-

Proof of payment. Payment is an act *in pais*, which may be proved not only by the record but by the original receipt;¹ and it may also be made out by any other evidence which satisfies a jury of the fact.² But payment cannot be shown in

payer has the right to pay on some of the several subdivisions of his property entered on the assessment rolls, without paying on all: *State v. Central Pac. R. Co.*, 21 Nev. 94. Where the law did not direct the particular manner in which the collection of an assessment should be made, a city, it was held, could direct the payment of an assessment in instalments: *Heath v. McCrea*, 20 Wash. 342. And directing such payment in instalments did not deprive an owner of the right to make payment in full at once: *Ibid.* As to the application of payments made at different times see *Fuller v. Grand Rapids*, 40 Mich. 395. Application by auditor-general of money sent to discharge specified taxes: *Detroit F. & M. Ins. Co. v. Wood*, 118 Mich. 31.

¹ *Moon v. March*, 40 Kan. 58; *Johnstone v. Scott*, 11 Mich. 232; *Seigneuret v. Fahey*, 27 Minn. 60; *McReynolds v. Longenberger*, 57 Pa. St. 13; *Deen v. Wills*, 21 Tex. 642; *Lobban v. State*, 9 Wyo. 377. Stub tax-receipt showing payment held admissible to defeat tax-deed: *McIntosh v. Marathon Land Co. (Wis.)*, 85 N. W. Rep. 976. Receipt varying from stub, mistake presumed to be in latter: *Bright v. Slocum*, 77 Iowa 27. One who pays taxes to one authorized to receive them is not prejudiced by the fact that receipt was not properly signed and countersigned: *Randall v. Dailey*, 66 Wis. 285. As to sufficiency of description in receipt to identify the land, see *Perkins v. Buckley*, 166 Ill. 229; *Sanitary Dist. v. Allen*, 178 Ill. 330; *Knight v. Valentine*, 34 Minn. 26. A county treasurer's receipt of taxes "in full for redemption from all delinquent taxes" for specified

years has not the effect of payment of taxes for other years, there being no evidence that the party was misled, or that he supposed he was making complete payment of all taxes due: *Knight v. Valentine, supra.* A receipt for the taxes of 1893, reciting "sold for taxes 1893," was held to be notice that payment was received subject to a prior sale, and not conclusive evidence under the statute of payment of prior taxes: *Rochford v. Fleming*, 10 S. D. 24. A statute making a tax-receipt conclusive as to payment of all taxes prior to its issue does not apply to a certificate of redemption from a tax-sale: *Danforth v. McCook County*, 11 S. D. 258. Irrespective of statute the legality of a tax is not shown by the receipt given on payment thereof: *Clark v. Blair*, 14 Fed. Rep. 812; *Hanna v. Fisher*, 95 Ind. 383; *Miller v. Hurford*, 13 Neb. 13; *Miller v. Wright*, 41 Neb. 351; *Adams v. Osgood*, 42 Neb. 450; *Smith v. Omaha*, 49 Neb. 883, 55 Neb. 766; see *Darr v. Wisner (Neb.)*, 88 N. W. Rep. 518. Tax-receipts in Nebraska held *prima facie* evidence of validity of taxes which they represent: *Ure v. Reichenberg (Neb.)*, 89 N. W. Rep. 414; *Ryan v. West (Neb.)*, 89 N. W. Rep. 416; *Concordia L. & T. Co. v. Van Camp (Neb.)*, 89 N. W. Rep. 744; *Starr v. Voss (Neb.)*, 89 N. W. Rep. 750. A mistake in the receipt may be shown: *Wolf v. Philadelphia*, 105 Pa. St. 25.

² *Swenson v. Mynair*, 79 Fed. Rep. 608; *Bennet v. North Colorado Springs Land, etc. Co.*, 23 Colo. 470; *Rand v. Schofield*, 43 Ill. 167; *Cook v. Norton*, 61 Ill. 285; *Taylor v. Lawrence*, 148 Ill. 388; *Keesling v. Powell*, 149 Ind. 372; *Keesling v. Winfield*, 149 Ind.

opposition to a judicial finding; at least as between the parties thereto and their privies.¹

Tender; attempted payment. Tender of the tax by any one who has a right to make payment is effectual to prevent a sale, whether the tender is accepted or not.² But a tender, in order to be effectual, must be of the full amount of any single tax; it cannot be of anything less, unless the statute makes provision for payment of a part by itself, as it does sometimes for the benefit of tenants in common or owners of distinct portions of the premises taxed.³ But where different taxes are

709; *Adams v. Beale*, 19 Iowa 61; *Buck v. Holt*, 74 Iowa 294; *Cornoy v. Wetmore*, 92 Iowa 100; *Mathews v. Buckingham*, 22 Kan. 166; *Leitzbach v. Jackman*, 28 Kan. 524; *Dennett v. Crocker*, 8 Greenl. 239; *Hammond v. Hannin*, 21 Mich. 374; *Richards v. Hatfield*, 40 Neb. 879; *Twinting v. Finlay*, 55 Neb. 152; *Joslyn v. Rockwell*, 59 Hun 129, 13 N. Y. Supp. 311; *Nickum v. Gaston*, 28 Or. 322; *Knupp v. Brooks*, 200 Pa. St. 494; *McDonough v. Jefferson County*, 79 Tex. 535. Proof by parol of the fact of payment of a tax on land is not to be excluded because of the failure of the tax-receipt properly to describe the land in question. A statute providing that no receipt other than that issued by the collector shall be valid as evidence means that such receipt is the only receipt valid in the tax-collector's favor: *Perret v. Borries* (Miss.), 30 South. Rep. 59, overruling *Edmonson v. Ingram*, 68 Miss. 32. Entry "paid" opposite taxes held admissible to defeat tax-deed: *McIntosh v. Marathon Land Co.* (Wis.), 85 N. W. Rep. 976. If one of several parcels apparently affected by a deed of conveyance is delinquent, the auditor should not indorse on the deed "Taxes paid and transfer entered": *State v. Weld*, 66 Minn. 219. Payment held provable by the collector in opposition to his official return: *Davis v. Hare*, 32 Ark. 386. As the

payment of taxes under color of title operates, when relied on, to defeat the paramount and all other titles, proof of it must be clear and convincing: *Burns v. Edwards*, 163 Ill. 494; *Bell v. Neiderer*, 169 Ill. 54; *McCauley v. Mahon*, 174 Ill. 385; *Clayton v. Feig*, 179 Ill. 534; *Travers v. McElvain*, 18 Ill. 382. As to proof of such payment, see *Perry v. Burton*, 111 Ill. 138; *Coxe v. Derringer*, 78 Pa. St. 271.

¹ *Wallace v. Brown*, 22 Ark. 118; *Gaylord v. Scarff*, 6 Iowa 179; *Cadmus v. Jackson*, 52 Pa. St. 295. But doubtless even a judicial finding may be set aside for fraud on a proper showing in such a case: See *Wallace v. Brown*, *supra*.

² *Tacey v. Irwin*, 18 Wall. 459; *Schenck v. Peay*, 1 Dill. 267; *Parsons v. Slaughter*, 63 Fed. Rep. 876; *Kinsworthy v. Austin*, 23 Ark. 375; *Loomis v. Pingree*, 43 Me. 299; *Jones v. Burford*, 26 Miss. 94; *State v. Central Pac. R. Co.*, 21 Nev. 247.

³ *Hunt v. McFadgen*, 20 Ark. 277; *State v. Carson City Savings Bank*, 17 Nev. 146; *Heft v. Gephart*, 65 Pa. St. 510; *Crum v. Burke*, 25 Pa. St. 377. If the taxpayer wishes to contest any part of the tax less than the whole, he should tender the whole and then bring his suit: *Julien v. Ainsworth*, 27 Kan. 446. But see *ante*, p. 806. If a tax is subject to a penalty for a delay in payment, but

brought together for the purposes of a sale for all, the taxpayer has a right to pay any one separately, and to contest others.¹ If the owner of land or the holder of a lien thereon applies in good faith to the proper officer for the purpose of ascertaining the amount of the taxes and of paying the same, and is prevented by such officer's mistake, wrong, or fault, such attempt to pay is generally regarded as equivalent to payment.² But this has no application where the officer to whom application is made is not the one authorized to receive the tax,³ or where the mistake is not that of the officer.⁴ And

is actually received without the penalty, a sale cannot afterwards be made for the penalty: *Bracey v. Ray*, 26 La. An. 710.

¹ *Iowa, etc. Co. v. Carroll County*, 39 Iowa 151; *Olmsted County v. Barber*, 31 Minn. 256. The fact that one who tenders to a tax-collector money for taxes for several years declines to pay costs demanded therewith for certain years does not justify the collector's refusal to receive the tender for the other years: *Duvall v. Perkins*, 77 Md. 582.

² See *Hand v. Auditor-General*, 112 Mich. 597; *Hough v. Auditor-General*, 116 Mich. 663; *Carpenter v. Jones*, 117 Mich. 91; *Kneeland v. Wood*, 117 Mich. 174; *Forrest v. Henry*, 33 Minn. 434; *Harness v. Cravens*, 126 Mo. 233; *People v. Registrar*, 114 N. Y. 19; *Breisch v. Coxe*, 81 Pa. St. 336; *Pottsville Lumber Co. v. Wells*, 157 Pa. St. 5; *Gould v. Sullivan*, 84 Wis. 659; *Bray, etc. Co. v. Newman*, 92 Wis. 271; *Edwards v. Upham*, 93 Wis. 455. See *Hickman v. Kempner*, 35 Ark. 505; *Jiska v. Ringgold County*, 57 Iowa 630. In Mississippi, one attempting in good faith to pay his taxes, and failing because of new maps and descriptions of which he has no knowledge, is not bound by a tax-sale and deed: *Richter v. Beaumont*, 67 Miss. 685; *Lewis v. Manson*, 151 U. S. 545. As to the remedy in Michigan where tax-deed has passed, see the cases

cited above; also, *Kneeland v. Hyman*, 118 Mich. 56. It was held in *Crosswell v. Benton*, 54 Minn. 264, that the auditor's mistake in omitting a year's taxes from a list furnished by him did not divest the lien of those taxes remaining unpaid. Owner using due diligence to ascertain and pay taxes, but misled by assessment and advertisement designating land by wrong warrant number, sale held void: *Freeman v. Cornwell* (Pa.), 15 Atl. Rep. 873. Payment on an imperfect description, supposed by both owner and assessor to be complete, held sufficient for the year: *Miller v. Hodsdon*, 33 Minn. 366.

³ *Edwards v. Upham*, 93 Wis. 455. If it is no part of the officer's duty to give information respecting payments, his mistake in saying that there is no back tax will not preclude collection: *Elliott v. District of Columbia*, 3 MacA. 396.

⁴ A taxpayer is liable for the consequence of mistaken payment on another's property, if the payment is not made through the county treasurer's mistake: *Browne v. Finlay*, 51 Neb. 465. See *Maxwell v. Hunter*, 65 Iowa 121. One who through ignorance or mistake pays taxes in one county is not thereby estopped from refusing further payment when he discovers that his lands are in another county: *State v. Baker*, 129 Mo. 482. The owner's

some cases hold that the doctrine of equitable estoppel arising from an officer's error or mistake does not apply against the state or one of its municipalities.¹

Effect of payment. If the owner or any other person entitled to make payment of a tax shall do so, the lien will not only be discharged absolutely, but all authority to proceed further against the property will be at an end.² The payment

refusal to pay taxes on the mistaken belief that they have been paid under another warrant will not defeat a tax-title: *Wilson v. Marvin*, 172 Pa. St. 275. Where by the mistake of the county clerk land in fact located in one school district was entered upon the collector's book as in another district, both districts belonging to the same municipality, and the land was taxed in, and voluntarily paid to, the former district, the other district could not recover the amount thus collected, the municipality, not being a trustee for one district of the amount collected from another: *Walser v. Board of Education*, 160 Ill. 572.

¹ *Ante*, p. 244. See *Philadelphia Mortg. & T. Co. v. Omaha* (Neb.), 88 N. W. Rep. 523, 90 N. W. Rep. 1005.

² *Bennett v. Hunter*, 9 Wall. 326; *Wallace v. Brown*, 22 Ark. 118; *Davis v. Hare*, 32 Ark. 386; *Kelso v. Robertson*, 51 Ark. 397; *Conant v. Buesing*, 23 Fla. 559; *Hunter v. Florida L. & M. Co.*, 33 Fla. 356; *Rish v. Ivey*, 76 Ga. 738; *Curry v. Hinman*, 11 Ill. 420; *Morrison v. Kelly*, 22 Ill. 610; *Walton v. Gray*, 29 Iowa 440; *Brown v. Pontchartrain Land Co.*, 48 La. An. 1188; *Rowland v. Doty*, Har. Ch. (Mich.) 3; *Johnstone v. Scott*, 11 Mich. 232; *Rayner v. Lee*, 20 Mich. 384; *Jones v. Burford*, 26 Miss. 194; *Metcalf v. Perry*, 66 Miss. 68; *Huber v. Pickler*, 94 Mo. 382; *Aurora v. Lindsay*, 146 Mo. 509; *Alexander v. Hunter*, 29 Neb. 259; *Rankin v. Coar*, 46 N. J. Eq. 566; *Jackson v. Morse*, 18 Johns.

441; *Joslyn v. Rockwell*, 128 N. Y. 334; *Oliphant v. Burns*, 146 N. Y. 218; *People v. Cady*, 51 N. Y. Super. Ct. 216; *Wooten v. White*, 126 N. C. 403; *Nickum v. Gaston*, 28 Or. 322; *Dougherty v. Dickey*, 4 W. & S. 146; *Hunter v. Cochran*, 3 Pa. St. 105; *Montgomery v. Meredith*, 17 Pa. St. 42; *Ankeny v. Allbright*, 20 Pa. St. 157; *Laird v. Heister*, 24 Pa. St. 452; *Brown v. Day*, 78 Pa. St. 129; *Dixon v. Hockady*, 36 S. C. 60; *Den v. Terrell*, 3 Hawks 283; *State v. Low*, 46 W. Va. 451; *Sprague v. Coenen*, 30 Wis. 209. This held to be so though not made to the officer who had the tax-list and to whom payment should have been made: *Jones v. Dils*, 18 W. Va. 759. Or though, by the tax-collector's mistake, the taxes paid were credited to another piece of property owned by a different person: *Lefebre v. Negrotto*, 44 La. An. 792. The payment of a special assessment, even if made by mistake by a person not the owner, discharges the land from further liability and defeats the right to sell: *Hudson v. People*, 188 Ill. 10. If there are two assessments of land, each of which would support a sale, a payment under one assessment renders unlawful a sale under the other: *Dodds v. Marx*, 63 Miss. 443. Where land had been assessed for the same year to two different persons, one of whom paid, the state could not acquire title by forfeiture for non-payment of the other assessment, even though it was against the holder of the record title, and

of taxes often has an important bearing upon the question of adverse possession, but that is beyond the scope of the present work.¹

though the person who paid the taxes had not the record title and was not in fact the true owner: *Wilbert v. Michel*, 42 La. An. 853. Where taxes have once been paid, by whatsoever means, the proceeding *in rem* is not available for the purpose of enforcing rights of third persons who may have paid such taxes: *People v. Winter*, 116 Ill. 211. The tax lien upon real estate existing in favor of the public is extinguished, ordinarily, by payment. The exception to the rule is where land has been sold by the county treasurer, and taxes against the same, becoming afterward delinquent, are paid by the holder of the tax-certificate: *Toy v. McHugh* (Neb.), 87 N. W. Rep. 1059. Where a sheriff voluntarily pays taxes assessed against one owning realty and personalty, and allows the owner to dispose of the personalty, he can be enjoined at the suit of the lienholder from selling the realty to pay the entire taxes: *Allen v. Perrine*, 103 Ky. 516. See *Hinchman v. Morris*, 29 W. Va. 673. An action of debt brought by a tax-collector for a tax is not barred by the fact that in a settlement with the treasurer the collector paid the tax before suit brought; it not appearing that defendant authorized the payment, or that plaintiff paid with an intent to relieve defendant from liability: *Lord v. Parker*, 83 Me. 530; and see *Page v. Claggett* (N. H.), 51 Atl. Rep. 686. Payment after a sale is of no avail even though made in ignorance of the sale: *Jones v. Wel-sing*, 52 Iowa 220. But it has been held that a purchaser of lands at a tax-sale loses his rights thereunder where the owner pays the taxes be-

fore the purchaser pays the amount bid or obtains a deed: *Burroughs v. Vance*, 75 Miss. 696. Where a tax was entered paid on the books, on the statement of an officer who had nothing to do with the collection that he would pay it, it was held competent to proceed and disprove the payment and take judgment for the amount: *People v. Palmer*, 2 Ill. App. 295. The voluntary payment by an executor of the amount fixed as the collateral inheritance-tax due from his testator's estate to the register of wills does not prevent an appeal by the commonwealth from the decree fixing the tax: *Commonwealth's Appeal*, 128 Pa. St. 603. Nor is jurisdiction to enforce such a tax affected by the executor's having voluntarily paid a like tax in another state: *In re Lewis's Estate* (Pa.), 52 Atl. Rep. 205.

¹See, on this subject, *Hackett v. Marmet Co.*, 52 Fed. Rep. 268, 3 C. C. A. 76; *Shanahan v. Tomlinson*, 103 Cal. 89; *Tuffree v. Polhemus*, 108 Cal. 670; *Southern Pac. R. Co. v. Whitaker*, 109 Cal. 268; *Warren v. Adams*, 19 Colo. 515; *Laughlin v. Denver*, 24 Colo. 255; *Green v. Christie* (Idaho), 40 Pac. Rep. 54; *Cooler v. Dearborn*, 115 Ill. 509; *Wisner v. Chamberlin*, 117 Ill. 368; *Peoria, D. & E. R. Co. v. Forsyth*, 118 Ill. 272; *Perry v. Burton*, 126 Ill. 599; *Grant v. Joliet, I. & E. R. Co.*, 128 Ill. 386; *Robbins v. Moore*, 129 Ill. 30; *Timmons v. Kidwell*, 138 Ill. 13; *Durfee v. Peoria, D. & E. R. Co.*, 140 Ill. 435; *Alsup v. Stewart* (Ill.), 62 N. E. Rep. 795; *Raymond v. Morrison*, 49 Iowa 371; *Hays v. McCormick*, 83 Iowa 89; *Up-tagrafft v. Smith*, 106 Iowa 385; *Chamberlain v. Abadie*, 48 La. An. 587; *Cook v. Rounds*, 60 Mich. 310;

Liability for taxes in special cases: Subrogation. As a general rule the liability for taxes is upon the owner of the property at the time the taxes accrue,¹ but it very often occurs that the state is in condition to collect its taxes, and does collect them, from persons who, as between themselves and others, by reason of contract relations, or other reason, ought not to pay them. In such cases the general rule is that the party who has made payment is entitled to recover in an appropriate suit at law against the party who should have paid.² Some of these cases will now be mentioned.

Mortgager and mortgagee. Where the land is taxed, the mortgager should pay the taxes on mortgaged land unless the statute provides otherwise;³ but if the duty of payment is neglected, the mortgagee may be compelled to pay to save his security from being cut off by sale of the land.⁴ Payment in such a case does not constitute a separate debt in his favor against the mortgager,⁵ but entitles him to add the amount to the sum

Murray v. Hudson, 65 Mich. 670; Wheeler v. Gorman, 80 Minn. 462; Willamette Real Estate Co. v. Hendrix, 28 Or. 485; Texas, T. & L. Co. v. Given (Tex. Civ. App.), 67 S. W. Rep. 892; Sparks v. Hall (Tex. Civ. App.), 67 S. W. Rep. 916.

¹ Gormley's Appeal, 27 Pa. St. 49. While the owner of land in Iowa is bound to pay the taxes on his land whether listed in his name or not, he is not bound to pay the taxes on personalty erroneously assessed to another: Brownlee v. Marion County, 53 Iowa 487. In Jefferson City v. Mock, 74 Mo. 61, the owner of land was held not personally liable for the taxes assessed to another.

² Where the owners of oil and mineral rights reserved from unseated lands pay taxes to prevent a sale, the owner of the lands is not subject to such a personal liability as to render him liable to them for the taxes, nor is there such a community of interest as would imply a promise to pay: Neill v. Lacy, 110 Pa. St. 294.

³ Snoddy v. Leavitt, 105 Ind. 357; Beltram v. Villere (La.), 4 South. Rep.

506. The same rule applies to the purchaser of the equity of redemption. Where such purchaser, while in possession of the land, paid taxes thereon for seven years, he was not entitled to invoke the statute of limitations: Alsup v. Stewart (Ill.), 62 N. E. Rep. 795.

⁴ Exum v. Baker, 115 N. C. 242. One who stands in the mere relation of mortgagee is under no obligation to pay taxes on the mortgaged premises: McLaughlin v. Acorn, 58 Kan. 514. In New Hampshire a mortgagee in possession is not bound to pay taxes: Eastman v. Thayer, 60 N. H. 408. In Pennsylvania it is said that a mortgagee in possession is to be treated as owner so far as concerns the payment of current taxes: Shoemaker v. Bank, 15 Phila. 297. Land sold on the foreclosure of a mortgage is liable for taxes assessed after the execution of the mortgage: Wooten v. Sugg, 114 N. C. 295.

⁵ Vincent v. Moore, 51 Mich. 618; Horrigan v. Wellmuth, 77 Mo. 542; Johnson v. Payne, 11 Neb. 269.

owing on his security, and collect the whole together.¹ He cannot, however, even on the mortgage, collect it as a separate

¹ *Mix v. Hotchkiss*, 14 Conn. 32; *New Haven Sav. Bank v. Atwater*, 51 Conn. 429; *Jackson v. Relf*, 26 Fla. 465; *Boone v. Clark*, 129 Ill. 466; *Stinson v. Connecticut Mut. L. Ins. Co.*, 174 Ill. 125; *West v. Hayes*, 117 Ind. 290; *Barthell v. Syverson*, 54 Iowa 160; *Stancelift v. Norton*, 11 Kan. 218; *Young v. Omohundro*, 69 Md. 424; *Kerse v. Miller*, 169 Mass. 44; *Townsend v. Case, etc. Co.*, 31 Neb. 836; *Brown v. Simons*, 44 N. H. 475; *Burr v. Veeder*, 3 Wend. 412; *Marshall v. Davies*, 78 N. Y. 414; *Sidenberg v. Ely*, 90 N. Y. 257; *Barnwell v. Marion*, 60 S. C. 314. If a mortgagee of real estate in Wisconsin pays or purchases tax-claims thereon in order to protect his interest, the *status* of such claims as tax-liens is thereby extinguished, but there is created, by force of the statute, a lien upon the realty in the payor's favor for the amount of his expenditures and interest, secured by the mortgage, of as high a grade as the original mortgage lien: *Endress v. Shore*, 110 Wis. 133. The mortgagee may assume the taxes to be legally assessed unless notified to the contrary, and his right to indemnification cannot be defeated by a showing that the tax was illegal: *Williams v. Hilton*, 35 Me. 547; *Bates v. People's, etc. Assoc.*, 42 Ohio St. 655. Mortgagee held not bound to contest tax-titles — could levy and charge to mortgager: *Windett v. Union Mut. L. Ins. Co.*, 144 U. S. 581. Mortgagee held entitled to be reimbursed out of the proceeds of foreclosure sales for taxes paid after but due before commencement of publication notice whereof stated taxes would be sold to pay debt, interest, and taxes: *Gorham v. National L. Ins. Co.*, 62 Minn. 327. An executor or administrator may pay taxes on property mortgaged to the estate, or a creditor may do so to protect his own interest, and be entitled to reimbursement on foreclosure: *Whittaker v. Wright*, 35 Ark. 511. Trustee in trust deed containing covenant by grantor to pay all taxes on the property and providing that in case of sale the trustee may pay out of the proceeds all money advanced for taxes, may redeem, out of such proceeds, the land from tax-sales: *Gormley v. Bunyan*, 138 U. S. 623. Grantee in deed absolute given to secure a note may pay taxes to preserve property as security for the debt, and may recover from grantor, even without express provision in deed: *Robinson v. Sulter*, 85 Ga. 875. Where a mortgagee holding under a trust deed claims full ownership and returns for taxation the entire property in his own name, the mortgager, on being decreed to have a right to redeem, will be charged only with the taxes properly assessable against his equity of redemption: *Sanford v. Savings & L. Assoc.*, 80 Fed. Rep. 54. A mortgager having covenanted to remove all encumbrances from the property, and a vigintillionth part having been sold for taxes, the mortgagee, having redeemed, was held entitled on foreclosure to a decree for the amount paid: *Stinson v. Connecticut Mut. L. Ins. Co.*, 174 Ill. 125. Where a mortgagee of personalty pays, to protect his lien, taxes levied thereon, he does not acquire a lien on the property for them; the statutory provision for lien for taxes paid relates to realty only: *Dunsmuir v. Port Angeles Gas, etc. Co. (Wash.)*, 63 Pac. Rep. 1095. A mortgager's covenant to pay taxes is not abrogated by a written agreement extending the time for the payment of the mortgage: *Leopold v. Hallheimer*, 1 App. Div. (N. Y.) 202, 37 N. Y. Supp. 154. Mortgage provis-

debt after the mortgage debt is paid.¹ And he should not assume that the tax will not be paid by the mortgager until the latter is in default.² As between the first mortgagee and the second it is the duty of each to pay the taxes; and if the second pays the taxes he is entitled to reimbursement when his rights are cut off by foreclosure.³

ion that on mortgager's failure to pay taxes on mortgaged property, mortgagee may pay and add to amount of mortgage lien, held valid in Michigan: *Farwell v. Bigelow*, 112 Mich. 285. See *Jehle v. Brooks*, 112 Mich. 131. As to the interest to which assignee of mortgage is entitled upon taxes paid, see *McCreery v. Schaffer*, 26 Neb. 173.

¹ *Vincent v. Moore*, 51 Mich. 618; *Kersenbrock v. Muff*, 29 Neb. 530. See *Manning v. Tuthill*, 30 N. J. Eq. 29. Compare *Horrigan v. Wellmuth*, 77 Mo. 542; *Nopson v. Horton*, 20 Minn. 268. After a foreclosure sale to the mortgagee he cannot pay taxes due at the time of sale, and retain the amount thereof out of the proceeds: *Wyatt v. Quimby*, 65 Minn. 527, citing *Spencer v. Levering*, 8 Minn. 461; *Nopson v. Horton*, *supra*, and *Gorham v. National L. Ins. Co.*, 62 Minn. 327. One who at a foreclosure sale buys property which is subject to taxes cannot, upon paying them, hold the mortgager for the amount unless by virtue of some contract or a warranty in the mortgage against taxes: *Semans v. Harvey*, 52 Ind. 331. Though a statute provides that taxes paid by the mortgagee on the mortgaged premises may be collected in the same manner as the amount secured by the original lien, and as a part thereof, there can be no recovery of taxes paid by him after the original debt is barred by limitation: *Hill v. Townley*, 45 Minn. 167. A receiver of mortgaged property need not, after the full amount of the mortgage debt, interest, and costs have been realized from a fore-

closure sale, be retained in office to pay a tax which the owner of the equity of redemption is not bound to pay until after the time for redemption has expired: *Bogardus v. Moses*, 181 Ill. 554. Where a mortgager's assignee pays a claim for delinquent taxes on the mortgaged premises which was proved against the mortgager's insolvent estate, after a sale under the mortgage subject to existing liens, the amount thus paid cannot be recovered from the mortgagee, though the condition of the sale was not expressed in the deed: *Brown v. Massachusetts Mut. L. Ins. Co.*, 157 Mass. 280.

² *Pond v. Drake*, 50 Mich. 302. Compare *Brevoort v. Randolph*, 7 How. Pr. 398. Where the statute makes real estate delinquent for taxes unpaid on the tenth day of May, the mortgagee may pay, and recover as part of the mortgage debt, taxes unpaid after that date, although the mortgage provides the mortgager shall deliver to the mortgagee the tax receipts on or before the first day of May: *Loughridge v. Northwestern Ins. Co.*, 180 Ill. 267.

³ *Norton v. Metropolitan L. Ins. Co.*, 74 Minn. 484. A junior mortgagee has a lien superior to a senior mortgage for taxes paid by him to protect his mortgage: *Noeker v. Howry*, 119 Mich. 626. A mortgagee, after bidding in the land at a tax-sale, foreclosed his mortgage and assigned his judgment to E., who bought at the foreclosure sale, and obtained a sheriff's deed thereunder, and who was subsequently held to have a better title than S., who had obtained a

Sometimes the law provides that mortgages shall be taxed as interests in the land,¹ that a mortgager who pays the tax thereon may deduct the amount of the tax from the mortgage,² and that any agreement binding him to pay the tax shall be void.³ Such an agreement would, however, seem to be valid unless forbidden by express provision of law.⁴

Vendor and vendee. In the absence of any special agreement the law determines the taxes to be paid by each party when real estate is sold.⁵ A vendee who takes possession under an executory contract is liable for the taxes unless the contract provides otherwise; and if the vendor is compelled to pay them he will be entitled to a conveyance until reim-

tax-deed under an assignment of the mortgagee's tax-certificate: *Eck v. Swennumson*, 73 Iowa 423. Where one who claims title to land by virtue of tax-leases conveyed such title to B., "subject to all liens and encumbrances now existing" on the property, a prior mortgagee could, on foreclosure, show that the taxes had been paid, and that therefore his mortgage was an existing lien, notwithstanding the possession of the tax-leases by B.: *Oliphant v. Burns*, 146 N. Y. 218.

¹ A release of a mortgage either by payment or foreclosure does not discharge the land from the lien of a tax levied thereon in respect of the mortgage, for such release or foreclosure operates as an equitable assignment to the mortgager of the mortgagee's interest in the land, carrying with it the encumbrance of this lien for taxes: *Dekum v. Multnomah City*, 38 Oreg. 253; *Alliance Trust Co. v. Multnomah City*, 38 Oreg. 433. Where land is assessed to the mortgagee and he pays the taxes, it becomes, under the California law, a payment on account of the mortgager, and is as if made by him: *Brown v. Clark*, 89 Cal. 196.

² The statute giving this privilege is permissive, and not mandatory, and does not prohibit an action to

recover the same: *San Gabriel Valley L. & W. Co. v. Witmer Bros.*, 96 Cal. 623.

³ For cases under the California law avoiding such agreements, and inflicting the penalty of loss of interest, see *Hewitt v. Dean*, 91 Cal. 5; *Burbridge v. Lemmert*, 99 Cal. 493; *Harralson v. Barrett*, 99 Cal. 607; *Daw v. Niles*, 104 Cal. 106; *California State Bank v. Webber*, 110 Cal. 538; *Matthews v. Ormerd* (Cal.), 66 Pac. Rep. 67. Where the statute provides that the mortgager may pay the tax and be allowed the amount on his debt, if the mortgagee insists on full payment and receives it, and the mortgager afterwards pays the tax, he may recover the amount of the mortgagee: *Blythe v. Luning*, 7 Sawy. 504.

⁴ See *Banks v. McClellan*, 24 Md. 62, 82; *Hammond v. Lovell*, 136 Mass. 184; *Common Council v. Board of Assessors*, 91 Mich. 78. A clause in the mortgage that the mortgage moneys should be paid "without any deduction, defalcation, or abatement to be made of anything for or in respect to any taxes," referred to taxes on the land and not on the mortgage security: *Clopton v. Philadelphia, etc. R. Co.*, 54 Pa. St. 356.

⁵ *Everett v. Dilley*, 39 Kan. 73.

bursed.¹ But the vendor is liable for taxes which had become a lien prior to the sale,² although it has been held competent to enact that a vendee who enters into possession shall be chargeable personally with taxes previously assessed.³

¹ See *Bradford v. Bank*, 13 How. 57; *Miller v. Corey*, 15 Iowa 166; *Watson v. Sawyers*, 54 Miss. 64; *Farber v. Purdy*, 69 Mo. 601; *McClure v. Campbell*, 25 Neb. 57; *Williamson v. Neeves*, 94 Wis. 656. See *Lathers v. Keogh*, 109 N. Y. 583. Where property is purchased after the making of a street improvement but before the assessment is made, if the purchaser wishes to protect himself from the lien of the assessment he must provide therefor in his deed or contract: *People v. Gilon*, 58 Hun 610. Where purchasers of an undivided half of wild timber lands under a contract silent as to possession and payment of taxes lumber the lands and receive half the benefit of the lumbering, they are liable for one-half of the taxes levied after the purchase: *Thompson v. Noble*, 108 Mich. 26. A vendee taking possession under a contract to pay taxes should pay those for the current year if they were not a lien when he went in: *Atchison, etc. R. Co. v.*

Jaques, 20 Kan. 639. Where a contract provided that certain persons might cut timber from another's land, they to pay all taxes on the land until they should give the owner written notice that they had removed all the timber they desired, whereupon they should be released from paying taxes that might be assessed thereafter, such notice to him before the amount of the assessment was ascertained by the board of supervisors released them from liability for taxes of that year though the land had been listed for taxation several months before: *Rothschild v. Begole*, 105 Mich. 388. A covenant to pay "all assessments for which premises shall be liable" will embrace an assessment only authorized by a law passed after the covenant: *Post v. Kearney*, 2 N. Y. 394. So a covenant to pay all taxes and duties covers an assessment provided for by a subsequent law: *Simonds v. Turner*, 120 Mass. 328. As one who conveys by warranty

² *Rundell v. Lakey*, 40 N. Y. 513. For taxes accrued upon land after it has been sold by an administrator the estate is not liable, but it is liable for taxes assessed upon the land before it was sold, though the assessment was made in the name of an heir or a legatee; and the burden of showing that the assessment was made when the estate was liable for the taxes, and that the amount paid was solely for taxes on the estate's property, rests upon the administrator: *Rudolph v. Underwood*, 88 Ga. 664. As to recovery by the purchaser at a judicial sale of sums paid by him for taxes previously assessed, see *Ellis v. Foster*, 7 Heisk.

131; *Staunton v. Harris*, 9 Heisk. 579; *Childress v. Vance*, 1 Baxt. 406. As to recovery by a purchaser whose purchase proves to be void, of taxes paid while claiming under it, see *Sims v. Gray*, 66 Mo. 613; *Cogburn v. Hunt*, 56 Miss. 718; *Schaefer v. Causey*, 8 Mo. App. 142; *Sivley v. Summers*, 57 Miss. 712.

³ *Henry v. Horstick*, 9 Watts 412. See, also, *Smeich v. York County*, 68 Pa. St. 439. But an express statute would be necessary to create such a liability: *Atlantic, etc. R. Co. v. Cleins*, 2 Dill. 175; *Biggins v. People*, 96 Ill. 381. See *Blodgett v. German, etc. Bank*, 69 Ind. 153; *Volger v. Sidener*, 86 Ind. 545.

Grantor and grantee. If one executes a conveyance of land with a covenant against encumbrances, he is liable for taxes or assessments which at the time of his conveyance had become a lien upon the land.¹ For taxes assessed subsequently to the

after an assessment is completed is liable on his covenant for a tax laid in pursuance of such assessment, the vendee who has paid it may recover the amount from the vendor on the latter's agreement to repay "in case he was legally liable to pay it:" *Rundell v. Lakey*, 40 N. Y. 513. As to the liability, under contract for sale of land, for taxes and assessment, see, further, *Kelly v. Westcott*, 91 Iowa 71; *Leeds v. Hardy*, 44 La. An. 556; *Miller v. Eheinzeig*, 79 Hun 1; *Caperton's Adm'r's v. Caperton's Heirs*, 36 W. Va. 479. Land may be treated as belonging either to the maker or the holder of a bond for title when the latter is in possession; but as between the parties to the bond, the one taking rents and profits, or enjoying the use, is liable for taxes: *National Bank v. Danforth*, 80 Ga. 55. And, generally, it is the duty of one in possession of premises and in receipt of the rents to keep down the taxes and assessments: *Leslie v. Leslie*, 58 N. J. Eq. 275. Where the trustee of a trust estate under adjudication in chancery pays taxes thereupon which a purchaser is bound by his contract to pay, he will be subrogated to the tax-collector's rights as against such purchaser: *Hebb v. Moore*, 66 Md. 167. A vendee of land who in the act of purchase denied that any taxes were due on the property cannot be held personally to have assumed a liability for the payment of taxes, or to have acknowledged the lien and privilege, because he added that if any taxes were due he would pay them: *Leeds & Co. v. Hardy*, 44 La. An. 556. Where land is sold and the lien thereon for taxes becomes

prescribed, the vendee is not liable for the taxes, since nothing but the vendor's personal liability remains, which alone can be enforced against him: *Ibid.* If an assignee for the benefit of creditors sells his assignor's personalty on which a tax had been assessed prior to the assignment but never levied, the proceeds in the assignee's hands are not garnishable for the tax, but belong to the creditors: *Shelby v. Tiddy*, 118 N. C. 792. As to the petition in an action by a vendee against his vendor for reimbursement for taxes paid by the vendee since the sale but which existed prior thereto: *Sandridge v. Hurd*, 40 La. An. 766.

¹ *McClure v. Campbell*, 25 Neb. 57; *Campbell v. McClure*, 45 Neb. 608; *Green v. Tidball* (Wash.), 67 Pac. Rep. 84. Parol evidence of a contract made with the vendee of land before the execution of a deed to him that he shall pay taxes which had become a lien is inadmissible to vary the terms of a covenant in the deed against encumbrances: *McClure v. Campbell*, *supra*. An assessment on land is not an encumbrance within the terms of a covenant in a deed until the date when it attaches as a lien on the land: *Bradley v. Dike*, 57 N. J. L. 471. Taxes assessed after land has been sold on contract are not an encumbrance "done or suffered from the grantor:" *Ibid.* The liability to assessments for the opening of a street is a breach of the covenant against encumbrances in a deed executed after the street was opened, though before any assessment was made: *Fagan v. Cadmus*, 46 N. J. L. 441. Instalments of an assessment levied after the deed was

grant the grantee is liable, even though they are assessed in the name of the previous owner.¹ Where property is sold by the same grantor to different purchasers at different times, and taxes are a lien on all the property, that which is last sold is primarily liable.² A transfer of franchises which, with the property used to exercise them, are inalienable, does not relieve the grantor from liability for the taxes thereon, or cast such liability on the grantee.³

Tenants for life. It is the duty of a tenant for life to keep the current taxes paid, and any other party who, on his de-

executed and delivered are not an encumbrance within the meaning of a covenant against encumbrances: *McLaughlin v. Miller*, 57 Hun 430. As to when an assessment for a validated improvement is an "encumbrance," see *Lafferty v. Milligan*, 165 Pa. St. 534. A provision of a city charter fixing the time when a local assessment becomes a lien was held to fix the time when it might be paid, not when the liability for it became an encumbrance as between grantor and grantee: *Green v. Tidball* (Wash.), 67 Pac. Rep. 84. The defense of a breach of warranty whereby a grantee has been compelled to pay taxes cannot be maintained by showing the tax-receipt without evidence that the tax was legally assessed: *Hanna v. Fisher*, 95 Ind. 383. Where a taxpayer and a city or county agree that in consideration of services to be rendered by him his taxes shall be canceled, performance of his part of the contract will not avail him in an action between him or his grantee and the purchaser of realty at a tax-sale, unless it appears that the county or city has paid the taxes: *Merriam v. Davey*, 25 Neb. 618. Where one who, on giving a deed with covenants of general warranty for quiet enjoyment and for further assurances only, took a mortgage for the purchase-

money, forecloses such mortgage, the mortgager, whose possession has not been disturbed, cannot have a reduction because of taxes and assessments for which the land has been sold, although before suit he notified the mortgagee and grantor to remove them: *Zabriskie v. Baudendistel*, 52 N. J. L. 104.

¹*King v. Mount Vernon Build. Assoc.*, 106 Pa. St. 165. See *Williams v. New York*, 58 Hun 610. A grantee in a deed agreeing to pay all the taxes that are due on the land only agrees to pay such as are lawfully due: *Cramer v. Armstrong* (Colo.), 66 Pac. Rep. 889. By custom a grantee in Philadelphia takes land subject to the payment of taxes proportionate to the unexpired fraction of the current year: *Moore v. Taylor*, 147 Pa. St. 481. Where property is allowed by the vendor to remain on the county's books after alienation, and he fails to avail himself of the means provided by law to have the assessment corrected, he is liable for such taxes, and they may be recovered by suit: *County Com'rs v. Claggett*, 31 Md. 210.

²*Merchants' Nat. Bank v. McWilliams*, 107 Ga. 532.

³*State v. Anderson*, 90 Wis. 550. This was a transfer by an electric-light company to a street-railway company of its franchises, etc.

fault, is compelled to make payment to protect an interest of his own, may have remedy over for the amount paid.¹ Assess-

¹ *Cummings v. Cummings*, 91 Fed. Rep. 602; *Chaplin v. United States*, 29 Ct. Cl. 231; *Hanna v. Palmer*, 194 Ill. —; *Thompson v. McCorkle*, 136 Ind. 484; *Olleman v. Kelgore*, 52 Iowa 38; *Booth v. Booth* (Iowa), 86 N. W. Rep. 50; *Lexington v. Fishback's Trustee* (Ky.), 60 S. W. Rep. 727; *Garland v. Garland*, 73 Me. 97; *Donohue v. Daniel*, 58 Md. 595; *Mayor v. Boyd*, 64 Md. 10; *Cooper v. Holmes*, 71 Md. 20; *Smith v. Blindbury*, 66 Mich. 319; *Jenks v. Horton*, 96 Mich. 13; *Watkins v. Green*, 101 Mich. 493; *Defreese v. Lake*, 109 Mich. 415; *Jeffers v. Sydnham* (Mich.), 89 N. W. Rep. 42; *Trust Co. v. Mintzer*, 65 Minn. 124; *Bone v. Tyrrell*, 113 Mo. 175; *Howell v. Jump*, 140 Mo. 441; *Disher v. Disher*, 45 Neb. 100; *Johnson County v. Tierney*, 56 Neb. 514; *Sillcocks v. Sillcocks*, 50 N. J. Eq. 25; *Cairns v. Chabert*, 3 Edwards Ch. 312; *Deraismes v. Deraismes*, 72 N. Y. 154; *Sidenberg v. Ely*, 90 N. Y. 257; *Albertson's Case*, 113 N. Y. 434; *Stevens v. Melcher*, 152 N. Y. 551; *In re Shipman's Estate*, 82 Hun 108, 31 N. Y. Supp. 571; *Anderson v. Hensley*, 8 Heisk. '834; *Little v. Edwards*, 84 Wis. 649. A tenant by the curtesy is alone personally liable for taxes legally assessed during his life, and only his interest is subject to a lien therefor: *White v. Portland*, 67 Conn. 273. The owner of the life-estate is required to pay the taxes thereon, and the *status* of the property for taxation is not changed by his permitting the executors to hold and manage the estate for him: *Hastings' Ex'r v. Lexington* (Ky.), 43 S. W. Rep. 415. The estate of the life-tenant and not of the remainderman is liable for taxes which became a lien on the land before the life-tenant's death, though she died before the expiration of the year for which they were levied: *Brodie v. Parsons* (Ky.), 64 S. W. Rep. 426. It being the duty of a person having the right of possession of premises during an estate for life to pay the taxes, such person acquires no rights against the remainderman by such payment: *Hall v. French* (Mo.), 65 S. W. Rep. 769. Under the Rhode Island statute the estate of the life-tenant in land is first liable for the taxes; a sale of the interest of the life-tenant and of that of the remainderman is void: *Weaver v. Arnold*, 15 R. I. 53. Failure to collect by seizure of chattels as required by statute delinquent taxes assessed during a life-estate does not divest from the tax-lien a remainderman's interest: *Johnson County v. Tierney*, 56 Neb. 514. Where the remaindermen, before the life-estate has been exhausted, pay taxes assessed against the life-tenant, they have no right to be subrogated to the state's lien on the life-estate for the amount so paid by them: *Ferguson v. Quinn*, 97 Tenn. 46. Where the owner of a life-estate fails to pay the taxes, and the land is sold under valid tax proceedings, title passes to the grantee, and the remaindermen have a remedy only against the life-tenant: *Watkins v. Green*, 101 Mich. 493. Under a statute providing that a life-tenant neglecting to pay taxes so long that the land is sold, etc., shall forfeit his estate to the person next entitled, no forfeiture occurs because of a sale for taxes where the assessment thereof is invalid: *Estabrook v. Royon*, 52 Ohio St. 318. Where an estate in remainder is purchased on foreclosure the purchaser cannot claim that the life-estate is forfeited because of a tax-sale of the lands and a failure to redeem, where the omission occurred before the

ments levied in order to defray the expense of permanent improvements should, however, be apportioned between the tenant for life and the remainderman.¹

foreclosure: *Chaffee v. Foster*, 52 Ohio St. 358. No forfeiture incurred where sale for taxes amounts merely to a payment of them, being to life-tenant's agent: *Swan v. Rainey*, 59 Ark. 364. Taxes being payable by the life-tenant and not by the remaindermen, taxes barred by the statute are by the life-tenant's promise to pay them taken out of the statute, so that proceedings against the land may be brought: *Duvall v. Perkins*, 77 Md. 582. A life-tenant is liable only for taxes which accrued during the life-tenancy: *Trimmier v. Darden*, 61 S. C. 220. And not for taxes assessed before his death to a testator whose will created the life-estate: *In re Babcock*, 115 N. Y. 450. As to payment of taxes in case of a life-estate in a fund, see *Span- gler v. York County*, 13 Pa. St. 322. The usual rule in such case is that taxes are payable out of the income: *Dilts v. Taylor*, 57 N. J. L. 369; *Duf- ford v. Smith*, 46 N. J. Eq. 216; *Will- iams v. Herrick*, 18 R. I. 120. But ordinary taxes on unproductive real- estate held by trustees for appreci- ation should be charged to principal and not to the income which by the trust is to be paid to the life-tenants: *Martin's Estate*, 16 Misc. Rep. 245, 39 N. Y. Supp. 189. In *Brecken- ridge v. Breckenridge*, 98 Va. 561, taxes paid by an executor accruing upon an estate in the hands of a widow, the life-tenant, were allowed to be credited to heirs as presumably paid in pursuance of a family ar- rangement. Where taxes have been paid by a dowress after her release of the premises to an heir who should have paid them, she cannot claim subrogation to a lien for them as against one who purchased on fore-

closure without notice of her equity: *Rankin v. Coar*, 46 N. J. Eq. 566.

¹*Pratt v. Douglass*, 38 N. J. Eq. 516; *Peck v. Sherwood*, 56 N. Y. 615; *Thomas v. Evans*, 105 N. Y. 601; *Chamberlin v. Gleason*, 163 N. Y. 214; *Chambers v. Chambers*, 20 R. I. 370; *Rhode Island Hospital Trust Co. v. Armington*, 21 R. I. 33. See *Plymp- ton v. Boston Dispensatory*, 106 Mass. 544. It is said in *Peck v. Sherwood*, *supra*, that a municipal assessment for the flagging of sidewalks is not in the nature of an annual tax to be paid entirely by a tenant for life of the premises, neither is it such a permanent improvement as that he should not contribute to the pay- ment of it, but it should be appor- tioned between him and the remain- dermen. And in *Stevens v. Miller*, 152 N. Y. 551, it is declared that life- tenants or the trustees for equitable life-tenants should not be compelled to bear the whole expense of perma- nent improvements required by the state or municipal authorities, such as assessments for flagging a side- walk. In *Chamberlin v. Gleason*, *supra*, it was held that a paving as- sessment laid against abutting prop- erty is properly apportioned so that the life-tenant pays the interest on the assessment during her life, and the remaindermen pay the princi- pal of the assessment as it falls due. So, a life-tenant is required to pay such proportion only of a street- extension assessment levied on im- proved trust property as the value of the life-estate bears to the value of the property: *Rhode Island Hosp. Trust Co. v. Armington*, 21 R. I. 33. Payment of an assessment on certain unimproved lots belonging to the trust property from the proceeds of un-

Tenant in common. Each tenant in common is bound to pay the tax on his own interest; but if one is compelled to pay upon all, he may charge the interest of his co-tenant with the proportionate part which such co-tenant should have paid.¹

improved lands thereof, which after the sale formed a part of the principal of the trust estate, held an equitable apportionment of the assessment between the life-tenant and remaindermen, since by such payment the life-tenant lost the income of the sum paid, and the increased value from the betterment inured to the benefit of the remaindermen: *Ibid.* Assessments for sewers and curbing are not "taxes" within the meaning of a devise requiring the life-tenant to "pay all necessary taxes on the property," and such assessments should be apportioned between him and the remaindermen. *Chambers v. Chambers*, 20 R. I. 370. It is held in Illinois that as between life-tenant and remaindermen the latter cannot be compelled to pay a special assessment levied for a permanent improvement which increased the value of the remainder: *Huston v. Tribbetts*, 171 Ill. 547. And in Kentucky the rule is that the life-tenant must alone pay the cost of repairing a sidewalk in front of property where the old pavement had been worn away by long use: *Hadworth v. Stone Co. (Ky.)*, 50 S. W. Rep. 33; *Brodie v. Parsons (Ky.)*, 64 S. W. Rep. 426. It is not the duty of a widow occupying the premises of a decedent with the consent of the children to pay assessments for benefits: *Thiele v. Thiele*, 57 N. J. Eq. 98.

¹ See *Schissel v. Dickson*, 129 Ind. 139; *Hurley v. Hurley*, 148 Mass. 444; *Davidson v. Wallace*, 53 Miss. 475; *Thiele v. Thiele*, 57 N. J. Eq. 98; *McAdam v. Honey*, 20 R. I. 351. In Louisiana taxes assessed against two persons as the joint owners of property constitute only joint personal

obligations against them for the payment of the taxes: *Mercier's Succession*, 42 La. An. 1135. On an accounting by a guardian, where property is owned by two persons but assessed to one, taxes paid thereon are properly charged in proportion to the interest of each of the owners: *Billington v. Sims*, 52 La. An. 2083. Where the statute makes general taxes apportionable, each of several infants occupying a homestead is liable only for his own share of taxes paid by a third person for them at the request of adult owners: *Horstmeyer v. Connors*, 56 Mo. App. 115. Where an assessment for a street improvement was to "unknown owners," the payment by one of several co-owners of his proportion does not release any part of a lot from the lien of the assessment: *Stockton Savings, etc. Assoc. v. Harold*, 127 Cal. 612. A tenant-in-common who, on counsel's advice, paid off an invalid tax-lien, was held to have acted prudently so as to be credited therewith in his account with his co-tenant, notwithstanding his co-tenant's success in defeating subsequently other tax-bills which grew out of the same contract for public improvement: *Bates v. Hamilton*, 144 Mo. 1. A tenant-in-common who has paid the entire purchase price, and is in possession, collecting the rents and profits and not accounting therefor, is not bound to pay the taxes assessed to his co-tenant: *Oglesby v. Hollister*, 76 Cal. 136. Where two of several tenants in common have occupied and used the entire property, and paid the taxes thereon, the amount so paid should, in a suit for partition, be divided

Lessor and lessee. The general rule where the lease is silent upon the subject imposes upon the lessor the obligation to pay the taxes upon the leased property.¹ Where land is assessed to an occupant who is tenant of the owner, it is sometimes provided by statute that he shall be entitled to deduct from the rent the taxes paid;² but this is subject to be changed by contract.³ The lessee's assumption of the payment of taxes

among the several tenants in common in proportion to the interest of each in the land: *Plant v. Fate* (Iowa), 86 N. W. Rep. 276. The owner of an undivided half interest in personalty who is in possession of the whole of it is liable for the whole of the tax upon it: *Chapin v. Streeter*, 124 U. S. 360. Co-tenants having exclusive possession are not allowed in partition for taxes and assessments paid except by way of offset to rent: *McClaskey v. Barr*, 62 Fed. Rep. 209. But a tenant-in-common in sole possession is entitled to recover in partition his proportion of taxes paid where improvements made by him equal the rental value: *Leake v. Hayes*, 13 Wash. 213. Taxes paid by a tenant in common on the common property, or an amount paid to procure a conveyance from one who claimed title to the same adversely and under a tax-deed, cannot be made a charge upon a co-tenant's estate after it has passed into the hands of a purchaser without notice: *Welch v. Ketcham*, 48 Minn. 241.

¹ *Freeman v. State*, 115 Ala. 208; *People v. Barker*, 153 N. Y. 98; *East Tennessee, etc. R. Co. v. Morristown* (Tenn. Ch. App.), 35 S. W. Rep. 771.

² It is said that a tenant entitled by statute to deduct from his rent the taxes paid on the land can deduct such as the land was chargeable with in its condition as rented, and not such as his own subsequent improvements have caused: *Mayo v. Carrington*, 19 Grat. 74. Where, under the statute, a lessee operating a railway is to pay the tax upon the

gross earnings thereof, a notice by the lessor's treasurer to the lessee that the tax in question is regarded by the lessor as invalid, without specifying the ground or offering to indemnify the lessee for resisting payment, does not enable the lessor to recover the tax from the lessee after it has paid it in accordance with the law: *Vermont & C. R. Co. v. Vermont Central R. Co.*, 63 Vt. 1. A decision of the supreme court that all taxes paid by such lessee in accordance with the statute are, notwithstanding the unconstitutionality of the act, valid payments as against the lessor, and so, *pro tanto*, payments in extinguishment of rent due, refers only to payments made in accordance with said statute, viz., on the gross receipts; and any attempt, therefore, to apportion the tax of the two roads according to mileage, which increases the tax to the lessor, is unwarranted: *Vermont & C. R. Co. v. Central Vermont R. Co.*, 65 Vt. 366. It was held in *Walker v. Harrison*, 75 Miss. 665, that a tenant can recover of his landlord taxes paid by him, since his payment of taxes is not a voluntary payment on his part of another's debt.

³ See *Hammon v. Sexton*, 69 Ind. 37. By assuming in a lease the payment of taxes which shall subsequently be assessed upon the demised premises, a tenant does not thereby obligate himself to pay any taxes that may be illegal and void: *Scott v. Society*, 59 Neb. 571. A lessee's covenant to pay "the taxes of every name and kind that should

and assessments does not relieve the lessor from his liability for them to the state or municipality,¹ nor does it enable the taxing authority to secure a personal judgment against the lessee.²

Executors, etc. Taxes assessed upon land during the life-time of its owner should be paid by the administrator of his estate; taxes accruing subsequently devolve upon his heirs.³ An executor is entitled to credit for paying taxes assessed against the property of the estate for the year in which the testator died, and which were also a personal charge against the latter.⁴ And if executors, to prevent loss of real estate, pay taxes for the non-payment of which the heirs have permitted the land to be returned delinquent, they are entitled, as against the residuary legatees, to credit for the taxes so paid, whether or not, having a mere naked power to sell, they were under a duty to pay such taxes.⁵ But an executor is not entitled to credit in his accounts for paying taxes, a part of which were on lands of

be assessed on the premises" will not cover an assessment for benefits accruing from street improvements: *Beals v. Providence Rubber Co.*, 11 R. L. 381. See *Love v. Howard*, 6 R. L. 116; and compare *Blake v. Baker*, 115 Mass. 188; *Cassady v. Hammer*, 62 Iowa 359. Whether lessee is liable, under terms of lease, for assessment for repaving, see *Ten Eyck v. Rector*, 65 Hun 194. Failure to pay taxes required by lease to be paid—default and forfeiture: *Heiple v. Reinhart*, 100 Iowa 525; *Ricon v. Hart*, 47 La. An. 1370. A covenant by the lessee in a lease of a part of a building to pay all the taxes which may be payable for or in respect of the said premises is construed as a covenant to pay a proportion of the tax assessed on the whole: *Wall v. Hinds*, 4 Gray 256. See *Codman v. Hall*, 9 Allen 335; *Amory v. Melvin*, 112 Mass. 83. But where, a few days prior to the execution of a lease of part of a building, the lessee therein became the assignee of another lease of the rest

of the building, it was held that a covenant in the later lease requiring the lessee, should the taxes levied on the premises therein leased be "increased above the present assessment," to pay the excess, required him to pay the increase in the taxes on the whole building: *Stimson v. Crosby* (Mass.), 62 N. E. Rep. 267.

¹ See *Yazoo & M. V. R. Co. v. Adams*, 76 Miss. 545; *Miles v. Delaware & H. Canal Co.*, 140 Pa. St. 623; *Haylett v. McCutcheon*, 158 Pa. St. 539.

² *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112 Iowa 300. A trustee for the creditors of a lessee is not required to pay taxes on leased premises out of funds realized from sales of property not forming part of the leasehold: *Parlett v. Dugan*, 85 Md. 407.

³ *Henderson v. Whiting*, 56 Ind. 131.

⁴ *Chandler v. Chandler*, 87 Ala. 300.

⁵ *Dunn's Ex'rs v. Renick*, 33 W. Va. 476.

which the testator did not die seized, where it is not shown what part was on the testator's lands, or for the payment of taxes on land belonging to the heirs.¹ An administrator is entitled to credit for taxes paid by him on land of the estate,² though not for taxes paid, after the sale, on land sold to pay debts.³ An administrator's liability for taxes on his decedent's estate is personal and not official, and on his discharge is assumed by his successor.⁴ Residuary legatees who are to take after a certain debt and a certain legacy are paid, and who, because of the estate's being exhausted by such payment, receive nothing therefrom, are not liable for taxes paid by the executor.⁵

Payment under mistake as to ownership. The rule as to remedy in cases in which parties have paid taxes under a supposition that they were owners, which afterwards proved to be erroneous, are different in different states. In some states such a payment would not only give the party paying a right of action against the owner of the land, but would also give him a lien upon the land for his security.⁶ But there is no general rule to this effect, and in the absence of any statute on the subject the ruling of the federal supreme court would be followed, that ignorance of the law in respect to title and good faith in the payment of taxes will not sustain an action where the payment has been voluntary, without any request from the true owners of the land and with a full knowledge of all the facts.⁷

Return of delinquent taxes. Where a tax against lands is assessed to a resident and is a personal charge against him, the statutes, with almost unvarying uniformity, have made the personal property of the person taxed the primary fund for the

¹ In *re Decker's Estate*, 111 N. Y. 284. Iowa 691; *Bradley v. Cole*, 67 Iowa 650; *Goodnow v. Burrows*, 74 Iowa 256; *Merrill v. Tobin*, 82 Iowa 529.

² *Armstrong v. Cashion* (Ark.), 16 S. W. Rep. 666; *Scudder v. Ames*, 89 Mo. 496. See *Penrose v. Doherty* (Ark.), 67 S. W. Rep. 398; *Thompson v. Savage*, 47 Iowa 522; *Ingersoll v. Jeffords*, 55 Miss. 37; *Shaefer v. Causey*, 8 Mo. App. 142; *Union R. Co. v. Skinner*, 9 Mo. App. 189.

³ *Ambleton v. Dyer*, 53 Ark. 224.

⁴ *San Francisco v. Pennie*, 93 Cal. 465.

⁵ *Dunn's Ex'rs v. Renick*, 40 W. Va. 349.

⁶ *Kemp v. Cossart*, 47 Ark. 62; *Goodnow v. Moulton*, 51 Iowa 555; *Goodnow v. Litchfield*, 63 Iowa 275, 67

⁷ *Homestead County v. Valley R. Co.*, 17 Wall. 153. See *Clafin v. McDonough*, 33 Mo. 412.

satisfaction of the tax, and have given a remedy for enforcing payment from it. Until that remedy has been exhausted, no authority exists to go further. It is also customary to allow a certain time after the levy of a tax on non-resident or unseated lands, before any proceedings are taken against the land. To authorize further proceedings in either case, there must be the proper official evidence that in the one case the remedy against the personalty is exhausted, and in both that the taxes are still unpaid.¹ This evidence will consist of such official return, affidavit, or other document by the collector, as

¹ See *Thatcher v. Powell*, 6 Wheat. 119; *Scales v. Alvis*, 12 Ala. 617; *Wartensleben v. Haithcock*, 80 Ala. 565; *Fleming v. McGee*, 81 Ala. 409; *Simms v. Greer*, 83 Ala. 263; *Feagin v. Jones*, 94 Ala. 587; *Jones v. McLain*, 23 Ark. 429; *Schaeffer v. People*, 60 Ill. 179; *Ring v. Ewing*, 47 Ind. 246; *Harrington v. Worcester*, 6 Allen 576; *St. Anthony, etc. Co. v. Greely*, 11 Minn. 321; *Huntington v. Brantley*, 33 Miss. 451; *Sharp v. Johnson*, 4 Hill. 92; *Kelley v. Craig*, 5 Ired. 129; *Francis v. Washburn*, 5 Hayw. 294; *Ebaugh v. Mullinax*, 34 S. C. 364; *Curtis v. Reneker*, 34 S. C. 468. No title can be made to lands on a sale for taxes if personalty is not sought for: *Catterlin v. Douglass*, 17 Ind. 213. See *Davis v. Minge*, 56 Ala. 121; *Abbott v. Edgerton*, 53 Ind. 196; *Ward v. Montgomery*, 57 Ind. 276; *Sharpe v. Dillman*, 77 Ind. 280; *Morrison v. Bank of Commerce*, 81 Ind. 335; *Volger v. Sidener*, 86 Ind. 545; *Johnson v. Briscoe*, 92 Ind. 367; *Pitcher v. Dove*, 99 Ind. 175; *Helms v. Wagner*, 102 Ind. 385; *Michigan Mut. L. Ins. Co. v. Kroh*, 102 Ind. 515; *St. Clair v. McClure*, 111 Ind. 467; *Commonwealth v. Three Forks Coal Co.*, 95 Ky. 273; *Wheeler v. Bramel* (Ky.), 8 S. W. Rep. 199; *Johnson v. Hahn*, 4 Neb. 139; *Kittle v. Shervin*, 11 Neb. 65; *Miller v. Hurford*, 13 Neb. 13; *Brown v. Goodwin*, 75 N. Y. 409; *Kean v. Kinnear*, 171 Pa. St. 639; *Simpson v. Meyers*, 197 Pa. St. 522; *Hamer v. Weber County*, 11 Utah 1, 16. Omission of tax-collector's oath as to search for personalty held not to invalidate sale where realty was assessed to "owner unknown:" *Cary v. Holmes*, 109 Ala. 217. Return of inability to make personal taxes out of personalty held, under statute, not a condition to sale of realty: *Iowa Land Co. v. Douglas County*, 8 S. D. 491; *Danforth v. McCook County*, 11 S. D. 258. In some states prior exhaustion of personalty is not necessary: *West v. Duncan*, 42 Fed. Rep. 430; *Ward v. Gallatin County Com'rs*, 12 Mont. 23; *Lancaster County v. Rush*, 35 Neb. 119. See, further, *Frost v. Flick*, 1 Dak. 131; *Stanly v. Baird*, 118 N. C. 75; *Geer v. Brown*, 126 N. C. 238; *Interstate B. & L. Assoc. v. Waters*, 50 S. C. 459. It can be no objection to a judgment against the land for taxes that the collector did not make the tax out of the personalty, when the collector did distrain personalty and the objector replevied the same out of the collector's hand: *Deerham v. People*, 67 Ill. 414. In Illinois a tax-lien is not divested by an officer's failure to make due return; *Union Trust Co. v. Weber*, 96 Ill. 346. But in Michigan, under a former statute, the township treasurer's failure to subscribe and swear to his return of delinquent taxes avoided a tax-title: *Seymour v. Peters*, 67 Mich. 415.

the statute may indicate, and it must be made in due form of law and at the proper time. A return made prematurely is void,¹ though it be but a single day before the time; for it shortens to that extent the period allowed to the taxpayer for making payment without further cost, and thus deprives him of a legal right.² So a return is void which fails to set forth all the facts that the statute requires shall be shown by it.³ If the collector is required to demand the tax, his return, it would seem, should show that he has done so; if he is required to make collection by distress and sale of goods, if any can be found to levy upon, there should be such a showing of diligent search for goods, and failure to find them, as would be required of officers to whom executions are committed for service. In other words, the return should show full and complete compliance with all the conditions which, under the statute, are to precede a resort to the land.⁴ Such is unquestionably the general conclusion of the authorities;⁵ though, probably, if the stat-

¹ Ronkendorf v. Taylor's Lessee, 4 Pet. 349; Hickman v. Kemper, 35 Ark. 505; Bailey v. Haywood, 70 Mich. 188.

² Flint v. Sawyer, 30 Me. 226; Hobbs v. Clements, 32 Me. 67. The return will be presumed to have been made at the proper time unless the contrary appears: Mix v. People, 81 Ill. 118. A tax-deed based on a sale for a year in which the property was not returned is void: Newkirk v. Fisher, 72 Mich. 113. Statutory provisions requiring tax-collectors to make returns to county commissioners for exoneration on or before a day designated are mandatory, and observance of them is a condition precedent to the right to sell for unpaid taxes the land so returned: Vandemark v. Phillips, 116 Pa. St. 199.

³ See Trainor's Succession, 27 La. An. 150, for an analogous ruling.

⁴ Hughes v. Linn County, 37 Or. 111. In Tompkins v. Johnson, 75 Mich. 181, it was held not sufficient for the marshal's certificate to recite that he could find no personal property on the premises, where the person chargeable had personalty in another

part of the city which might have been but was not levied upon. A recital in a collector's return that, "not knowing of any goods or chattels," etc., is not equivalent to a return that none could be found: Jones v. McLain, 23 Ark. 429. But it is sufficient, to throw the burden of proof on the taxpayer, to show that there was enough of personalty to satisfy the tax. But where he is to make his return from "the best information he could obtain," he is himself the judge of the sufficiency of the information, and the return is *prima facie* evidence of the facts stated: Andrews v. People, 75 Ill. 605. Where a collector of taxes returned a tax-warrant with defendant's tax uncollected, and on the tax-bill there was the notation, in lead-pencil, "not pay," the return was held sufficient to authorize proceedings supplementary to execution for the collection of such tax: In re Veith, 165 N. Y. 204.

⁵ Belden v. State, 46 Tex. 103; Johnson v. Hahn, 4 Neb. 139; Thompson v. Burhans, 51 N. Y. 52. As to the requisites of a return in Ohio, see Stambaugh v. Carlin, 35 Ohio St. 209.

ute were to prescribe a form for the return, which was something less full than would otherwise be requisite, a return in conformity to it would be sufficient.¹ But the decisions are justly very rigid in requiring conformity to the statute in the substantial matters of the return,² particularly in the matter of verification, which, if omitted or legally defective, will leave the return a nullity.³ There is special reason for particularity here, since the return, if in conformity with the law, is not only a support to subsequent proceedings, but is evidence, also, in favor of the officer himself.⁴

As to what is a sufficient showing of the names of owners of lands, see *Halsey v. People*, 84 Ill. 89. A personal demand may be assumed when the officer returns that "he has not, upon diligent inquiry, been able to discover any goods," etc.: *Dickison v. Reynolds*, 48 Mich. 158. No return of "no goods" is requisite in Georgia where the tax to be levied is less than \$100: *Plant v. Eichburg*, 65 Ga. 64. Nor does such a return seem to be required in Maryland: *Dyer v. Boswell*, 39 Md. 465. Nor in New Jersey in respect to the taxes of Newark: *Martin v. Carron*, 26 N. J. L. 228; *State v. Newark*, 42 N. J. L. 38.

¹ Such has been the ruling of the supreme court of Illinois: *Taylor v. People*, 2 Gilm. 349; *Job v. Tebbetts*, 5 Gilm. 376, 382. Judge *Pope*, the federal district judge, held otherwise: *Mayhew v. Davis*, 4 McLean, 213.

² *Spellman v. Curtenius*, 12 Ill. 409; *Harrington v. Worcester*, 6 Allen 576; *Upton v. Kennedy*, 36 Mich. 215; *O'Connor v. Finnigan*, 60 Minn. 455; *Homer v. Cilley*, 14 N. H. 85; *Sharp v. Johnson*, 4 Hill. 92; *Tallman v. White*, 2 N. Y. 66; *Harmon's Lessee v. Stockwell*, 9 Ohio 94; *Hannell v. Smith*, 15 Ohio 134; *Van Loon v. Engle*, 171 Pa. St. 157. A return not made in the time prescribed by statute, held not to support subsequent proceedings to forfeit the land: *Hop-*

kins v. Sandidge, 31 Miss. 668, 676; *Weir v. Kitchens*, 52 Miss. 74; *Vandemark v. Phillips*, 116 Pa. St. 199. As to description of land in delinquent tax-list, see *People v. Rickert*, 159 Ill. 496; *Sholl v. People*, 194 Ill. 24; *Knight v. Alexander*, 38 Minn. 384.

³ *Miner's Lessee v. McLean*, 4 McLean 138; *Hogelskamp v. Weeks*, 37 Mich. 422; *Seymour v. Peters*, 67 Mich. 415; *Harmon's Lessee v. Stockwell*, 9 Ohio 94; *Cotzhausen v. Kaehler*, 42 Wis. 332. Want of a venue held fatal: *Thompson v. Burhans*, 61 N. Y. 52. The omission of a word where the error is manifest will be overlooked: *Scheiber v. Kaehler*, 49 Wis. 291. The omission of the affidavit required to the roll in Louisiana does not vitiate the registry: *Succession of Edwards*, 32 La. An. 457. Certificate unnecessary when not required by statute: *Kane v. Brooklyn*, 114 N. Y. 586.

⁴ *Bruce v. Holden*, 21 Pick. 187; *Banard v. Graves*, 13 Met. 85; *State v. Van Every*, 75 Mo. 530. See cases cited *ante*, pp. 445, 446. In Illinois the return is *prima facie* evidence to support all prior proceedings: See *Durham v. People*, 67 Ill. 414; *Karnes v. People*, 73 Ill. 274; *Buck v. People*, 78 Ill. 560; *Chiniquy v. People*, 78 Ill. 570; *Mix v. People*, 81 Ill. 118; *Pike v. People*, 84 Ill. 80; *Mix v. People*, 86 Ill. 312; *Hosmer v. People*, 96

Collection: Summary remedies necessary. Very summary remedies have been allowed, in every age and country, for the collection by the government of its revenues.¹ They have been considered a matter of state necessity. Without them it might be possible for a party which had been defeated in its efforts to obtain possession of the government in the constitutional way, to cripple the government for the time being, and possibly to break it up altogether. If the state might be deprived of the resources for continuing its existence and performing its regular functions until a revenue could be collected by the processes provided for the enforcement of debts owing to individuals, it would be continually at the mercy of factions and discontented parties. Obviously this could not be tolerated. It has been shown in the preceding chapters that the protective principles of the common law are not supposed to be violated by a resort to summary proceedings in these cases. Summary processes are not necessarily unjust,² though they

Ill. 58; *Frew v. Taylor*, 106 Ill. 159; *Mix v. People*, 106 Ill. 425; *Brackett v. People*, 115 Ill. 29; *People v. Givens*, 123 Ill. 352; *Coal Co. v. Baker*, 135 Ill. 545; *Mahany v. People*, 138 Ill. 311; *People v. Chicago & A. R. Co.*, 140 Ill. 210; *Scott v. People*, 142 Ill. 291; *People v. Chicago & A. R. Co.*, 140 Ill. 210; *Walker v. People*, 166 Ill. 96; *Chicago & N. W. R. Co. v. People*, 183 Ill. 196, 193 Ill. 539; *People v. Keener*, 194 Ill. 16; *Sholl v. People*, 194 Ill. 24. In this respect special assessments are like other taxes: *People v. Givens*, 123 Ill. 352. The delinquent tax-list in North Dakota is *prima facie* evidence that the taxes appearing thereon are valid: *Emmons County v. First Nat. Bank's Lands*, 9 N. D. 583. It is constitutional to make a return *prima facie* but not conclusive evidence of delinquency: *Andrews v. People*, 75 Ill. 605; *Burbank v. People*, 90 Ill. 554. As to the conclusiveness of the officer's return, see also, *ante*, pp. 444-446; *Davis v. Hare*, 32 Ark. 356; *Bowen v. Donovan*, 32 Ind. 379. If

the collector is to make his returns from "the best information he can obtain," he is the sole judge of the sufficiency of the information: *Andrews v. People*, 75 Ill. 605.

¹ *Cleveland, C., C. & St. L. R. Co. v. Backus*, 133 Ind. 513; *Pittsburgh, C., C. & St. L. R. Co. v. Backus*, 133 Ind. 625; *Leigh v. Green* (Neb.), 90 N. W. Rep. 255, 259; *Wells County v. McHenry*, 7 N. D. 246. "Very summary remedies may be used in the collection of taxes that could not be applied in cases of a judicial character:" *King v. Mullins*, 171 U. S. 404. "The process by which the property of the citizen is taken is of a somewhat summary character, although *quasi-judicial*: *State v. Thomas*, 16 Utah 86. See, also, *Page v. Claggett* (N. H.), 51 Atl. Rep. 686.

² *McMillen v. Anderson*, 95 U. S. 37. A statute providing for the summary sale of land for the non-payment of interest on forfeited or back taxes, or as a penalty for non-payment of taxes, is constitutional: *Chambers v. People*, 113 Ill. 509.

would be so if they deprived the party of a hearing, or if they precluded the opportunity for a patient and deliberate examination of the questions upon which his rights depend, before such rights could be finally concluded and cut off. But it is not the design of legitimate tax legislation to do this in any case. It may depart widely in its methods from those resorted to for the enforcement of rights at the common law, but the fundamental rules of justice will be observed, and, in theory at least, revenue laws will be careful for the protection of individual rights.

Methods of collection. A sovereignty will provide such methods for the collection of its revenue as are suitable to the various taxes laid, and its discretion is only limited by constitutional principles.¹ The method prescribed by statute is in general exclusive,² and, unless a contrary intent can be gath-

¹In the absence of constitutional restrictions, the sovereign power of the state may be exercised almost without limitation in determining how taxes shall be levied and collected: *In re Page*, 60 Kan. 842. "No prerogative of sovereignty is of higher importance than the power of taxation, which includes the collection, as well as the assessing, of taxes:" *Stevens v. New York & O. M. R. Co.*, 13 Blatch. 104. Where the power exists to impose a tax the means to be adopted for its collection must, within reasonable and rational limits, be a question for the legislature alone; as where congress requires a memorandum to be made of each sale at an exchange or board of trade: *Nicol v. Ames*, 173 U. S. 509. And the wisdom or policy of the method adopted for collection—as where the statute authorizes arrest for not performing highway labor—is for the legislature, not for the courts: *Short v. State*, 80 Md. 392, citing *Appleton v. Hopkins*, 5 Gray 530. The levying and collecting of a tax, whether state or county, is a matter solely of statu-

tory creation: *Hinchman v. Morris*, 29 W. Va. 673. As the state is competent to direct the mode or method by which taxes are collected, the power conferred upon the sheriff to collect, without special authority from the assessor, the taxes on stock driven into the state for grazing purposes does not violate the owner's constitutional rights: *Wright v. Stinson*, 16 Wash. 368. The act of receiving or collecting taxes is an official function to be performed only by a county officer invested for that purpose with a part of the sovereign power of the state; and the board of supervisors has no power to make a contract with a private individual to collect license taxes for a compensation, and such compensation cannot be enforced as a valid tax against the county: *Ventura County v. Clay*, 112 Cal. 65; and see *ante*, p. 427.

²*United States v. Truck's Adm'r*, 27 Fed. Rep. 541, 28 Fed. Rep. 846; *People v. Ballerino*, 99 Cal. 598; *Montezuma Valley Water-Supply Co. v. Bell*, 20 Colo. 175; *Sturgis v. Flanders*, 97 Mich. 546; *Croskerry v.*

ered from the statute, it must be followed strictly;¹ for the power which seeks to collect a tax must show clear authority

Busch, 116 Mich. 288; German American F. Ins. Co. v. Minden, 71 Minn. 870; State v. Snyder, 139 Mo. 549; Richards v. Clay County, 40 Neb. 45; Chappell v. Smith, 40 Neb. 579; Fitzgerald v. Construction Co., 41 Neb. 374; McHenry v. Kidder County, 8 N. D. 413; Pierce County v. Merrill, 19 Wash. 175. No method can be substituted for the statutory method; an agreement to submit to a court for determination the question whether property seized for the payment of taxes is liable to distress is void, since it is not authorized by statute: Brule County v. King, 11 S. D. 294. An agreement by a city attorney that a suit involving the right of the city to collect a tax shall abide the result of another suit to which the city is not a party, and of which it has no control, does not bind the city; the sovereign power of taxation which the state permits the city to exercise cannot be lost in this way: Board of Councilmen v. Deposit Bank (Ky.), 60 S. W. Rep. 19. Where the law imposing a tax provides a special remedy for enforcement, and such method is illegal, a different method cannot be substituted: Omaha v. Harmon, 58 Neb. 339. A statute providing for the recovery by motion of claims in favor of the state does not permit the collection in that manner of taxes against a railroad company's property, where another mode has

been prescribed for such collection: State v. Baltimore & O. R. Co., 41 W. Va. 81. The mode of collecting taxes being prescribed and pointed out by statute, a county cannot, until the statutory remedies have been exhausted, maintain a suit in equity to enforce the recovery of taxes: Greene County Com'rs v. Murphy, 107 N. C. 36. See State v. Georgia Co., 112 N. C. 34. A court of equity has not jurisdiction to collect taxes or appoint a receiver for that purpose where the treasurer has the exclusive right to do so by distress and sale: Pierce County v. Merrill, 19 Wash. 175. See Thompson v. Allen County, 115 U. S. 538. Where the statutes provided that taxes levied on real estate should be a lien thereon, and that the county treasurer should sell the land at auction to satisfy the lien, it was held that an action at law or a suit in equity would not lie to enforce collection: Montezuma Valley, etc. Co. v. Bell, 20 Colo. 175. So, in Sturgis v. Flanders, 97 Mich. 546, it was held that the remedy provided by statute for pursuing by sale the lien created on each parcel of land excluded an action for taxes returned delinquent as realty. And in Philadelphia v. Marklee, 159 Pa. St. 515, the right to sue an abutting owner in *assumpsit* for the cost of street paving was denied, the statute providing no remedy except a proceeding *in rem*. A

¹ McChesney v. People, 148 Ill. 221; Alton v. Middleton's Heirs, 158 Ill. 412; Merritt v. Kewanee, 175 Ill. 537; German American F. Ins. Co. v. Minden, 71 Minn. 870; Richards v. Clay County, 40 Neb. 45; Chappell v. Smith, 40 Neb. 579; Fitzgerald v. Construction Co., 41 Neb. 374. Where the statute expressly provides an

adequate remedy by which collection may be enforced, it should be pursued. If a county treasurer to whom taxes have been charged personally, fails to enforce payment in the manner and within the time provided by the statute, they cannot afterwards be enforced against the land: State v. Taggart, 148 Ind. 431.

to do so.¹ Sometimes the state may have in its own hands the means of enforcing the tax, without calling upon any one, as where it taxes the salaries of its own officers, or any fund or sum of money in its own treasury to be paid to individuals; in which case, under appropriate legislation, the tax may be deducted before payment is made.

Farming out the revenues. This is a method suited only to arbitrary governments and unenlightened peoples. It may be said in general to consist in putting the collection of the revenues under general rules for the determination of individual taxes, but without any specific listing, into the hands of contractors, who are to return to the treasury a certain net result, retaining the remainder for their profit. Such a system, by making it the personal interest of those who are to administer the tax-laws to render them as productive as possible, might increase the public revenues both by inducing a more vigilant search for subjects of taxation, and by insuring more strict enforcement of collections;² but it is so liable to abuse and oppression as generally to be condemned. In America it would not even be proposed, much less tolerated. And, indeed, any

statute giving the owner of property the privilege of deducting from the mortgage the amount of taxes paid on the mortgagee's interest is merely permissive, and does not prohibit an action to recover the same: *San Gabriel Valley L. etc. Co. v. Witmer Bros. Co.*, 96 Cal. 623. Where the constitutional method of collecting taxes is not by suit, but by summary seizure and sale of the property without suit, this does not debar judicial aid—as by summary rule compelling delivery—in reaching and uncovering the property in order that it may be so seized and sold: *State v. Meyer*, 41 La. An. 436. It has been held that a statute punishing by fine those doing business without license does not exclude a city's suing to recover such license; *State v. Fleming*, 112 Ala. 179. It has been held also that though there may be a specific statutory

remedy for the collection and enforcement of state and county taxes, such remedy restricts only the officers who collect the revenue, and not the state, which may pursue other methods to collect the tax: *State v. Georgia Co.*, 112 N. C. 34. The state's right to have the charter of a domestic corporation declared forfeited on its failure to pay taxes does not bar its right to bring a creditor's suit for the taxes, such forfeiture being a penalty which the state may insist on or waive, as it prefers. The fact that a remedy by distress is given will not, unless the statute is explicit, take away any existing right to collect taxes by suit: *Dubuque v. Railroad Co.*, 39 Iowa 56.

¹ *Linton v. Childs*, 105 Ga. 567.

² On this account Bentham defended it: *Works*, Edinburgh ed., vol. 2, p. 241.

arrangement making the collector a party in interest as to the taxes committed to him is contrary to the policy of the law.¹

Collection through third persons. For the most part the taxes levied by the states are collected of the persons taxed, or enforced against the property in respect to which they are imposed. In a few cases, however, in which such a course could not work injustice, the state may reach the party taxed by indirection, and collect in the first instance from some one else, who in turn will become collector from the person on whom the tax is really imposed. The reason for this is, that in such cases it is more convenient to the state, and perhaps makes more certain the collection; and it could be resorted to only when the case is such that injustice could result to no one. A case of the kind is where a tax is imposed on the dividends or other receipts of shareholders from the profits of corporations, or upon their shares, or upon the interest paid by indebted corporations, and where the corporation is required to make the payment, which it would then deduct from the payment to be made to shareholders, or to the holders of the evidences of indebtedness.² There is no doubt of the right to do this, except

¹ On this ground a special contract between a town and its collector, whereby the latter, in consideration of a sum of money, guaranteed the former against loss on account of unpaid taxes, was held void in *Page v. Claggett* (N. H.), 51 Atl. Rep. 686. The court in that case said: "A tax-warrant, with its peculiar attributes, is inseparable from the public for whose sovereign need it exists. It cannot be assigned, with the taxes, to whomsoever will pay them, nor can it be employed by the collector to reimburse him for taxes he has been compelled to pay for others, whether in fulfilment of a special contract of guaranty with the town, or to answer for his official default."

² *Railroad Co. v. Jackson*, 7 Wall. 262; *National Bank v. Commonwealth*, 9 Wall. 353; *United States v. Railroad Co.*, 17 Wall. 322; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *New Orleans v. Louisiana Sav. Bank, etc. Co.*, 31 La. An. 826; *Baltimore v. City Passenger R. Co.*, 51 Md. 31; *Maltby v. Reading R. Co.*, 52 Pa. St. 140; *Commonwealth v. Lehigh Valley R. Co.*, 104 Pa. St. 89; *Commonwealth v. Del. Div. Canal Co.*, 123 Pa. St. 594; *Commonwealth v. Lehigh Valley R. Co.*, 129 Pa. St. 429; *Commonwealth v. New York, L. E. & W. R. Co.*, 129 Pa. St. 463; *Commonwealth v. Philadelphia & R. C. & I. Co.*, 137 Pa. St. 481; *Commonwealth v. New York, L. E. & W. R. Co.*, 145 Pa. St. 38; *Commonwealth v. Pennsylvania Salt Manuf. Co.*, 145 Pa. St. 53; *Commonwealth v. Delaware & H. Canal Co.*, 150 Pa. St. 245; *Commonwealth v. Wilkes Barre & S. R. Co.*, 162 Pa. St. 614; *Commonwealth v. Lehigh Valley R. Co.*, 186 Pa. St. 235; *South Nashville St. R. Co. v. Morrow*, 3 Pickle 406; *St. Albans v. National Car Co.*, 57 Vt. 68; *Union Bank v. Richmond*, 94 Va. 316. In *Haight v. Railroad*

as to payments to be made to non-residents, nor even as to them if the statute under which their interests were acquired pro-

Co., 6 Wall. 15, it was held that a covenant by the corporation issuing the bond to pay the interest "without any deduction to be made for or in respect of any taxes, charges, or assessments," did not relieve the bondholder from the deduction of the federal five per cent. tax. Statute requiring treasurers of corporations to deduct "three mills on every dollar of the interest paid" is to be construed as requiring the tax to be deducted "off the interest paid:" *Commonwealth v. Delaware Div. Canal Co.*, 123 Pa. St. 594. Although statute makes it the duty of the "treasurer" of each private corporation to deduct a certain percentage, on the payment of interest on the corporation's bonds, and to return the same into the state treasury, yet on his failure to do so the account for the tax is properly settled against the corporation itself: *Commonwealth v. Delaware & H. Canal Co.*, 150 Pa. St. 245. As to resettlement of corporation's account for tax on capital stock, see *Commonwealth v. People's Traction Co.*, 183 Pa. St. 405. For Pennsylvania cases bearing on corporate liability for neglecting to collect the tax, and on the showing, or failure to show, what part of corporation's indebtedness is held by residents, see *Commonwealth v. Chester*, 123 Pa. St. 626; *Commonwealth v. Lehigh Valley R. Co.*, 129 Pa. St. 429; *Commonwealth v. Pennsylvania Salt Manuf. Co.*, 145 Pa. St. 53; *Commonwealth v. New York L. E. & W. R. Co.*, 145 Pa. St. 57; *Commonwealth v. People's Passenger R. Co.*, 183 Pa. St. 353; *Commonwealth v. Lehigh Valley R. Co.*, 186 Pa. St. 235. What constitutes a payment of interest by the corporation, so as to render it liable for paying the tax: *Commonwealth v. Philadelphia & R. C. & L.*

Co., 137 Pa. St. 481; *Commonwealth v. Philadelphia & R. C. & I. Co.*, 145 Pa. St. 283; *Commonwealth v. Philadelphia & R. R. Co.*, 150 Pa. St. 312. It was held in *South Nashville St. R. Co. v. Morrow*, *supra*, that a Tennessee statute undertaking to convert corporations into agencies for the collection of taxes laid upon their bondholders was so faulty, defective, and onerous as to be impracticable and void. In Maryland an action lies directly against the corporation to enforce the tax: *American Coal Co. v. Allegany County*, 59 Md. 185. In Kansas, however, the statute does not authorize levy against a bank to compel payment from delinquent stockholders: *First Nat. Bank v. Lyman*, 59 Kan. 410. And a bank is not to be held liable for the tax on its shares of stock which it should pay as the agent of the shareholders, unless it has money or property belonging to the delinquent shareholders: *Farmers' & T. Nat. Bank v. Hoffman*, 93 Iowa 119. So, when the shares are taxed as such, though the tax is to be paid by the corporation, such tax cannot, it seems, be enforced against the assets of the corporation after the corporation has become insolvent: *Boston v. Beal*, 55 Fed. Rep. 26; *Stapylton v. Thaggard*, 91 Fed. Rep. 93, 33 C. C. A. 353; *Lionberger v. Rowse*, 43 Mo. 67; *Relfe v. Life Insurance Co.*, 11 Mo. App. 374. See *Hewitt v. Traders' Bank*, 18 Wash. 326; *Bramel v. Manring*, 18 Wash. 421. It was held in *Boston & A. R. Co. v. Mercantile T. & D. Co.*, 82 Md. 535, that under a statute providing that taxes assessed on the shares of a corporation should be levied against and collected from the corporation, taxes so levied become a debt due from the corporation which is not affected by the corporation's insolvency occurring

vided for the levying and collecting of taxes in that manner.¹ Other instances are where a tax is required to be paid by the lessee of a railway operated under a lease, the amount of which tax may be deducted from the rent,² or where the person having the custody of distilled spirits is obliged to pay the tax thereon, he being given a lien on them for what he so pays.³

Collection by order of court. A court having in its charge or under its control a fund or other property upon which taxes are due, will, as the representative of the sovereignty, direct them to be paid without raising any question of the means of enforcement by process,⁴ and before all other claims except judicial costs.⁵ Thus, upon proper application and suitable

after such taxes become due and payable.

¹ *Minot v. Railroad Co.*, 18 Wall. 276; *Muskegon v. Lange*, 104 Mich. 19, 23, 24. See *State v. Travelers' Ins. Co.*, 70 Conn. 590, 73 Conn. 255.

² *Vermont & C. R. Co. v. Vermont Central Co.*, 63 Vt. 1.

³ *Fowble v. Kemp*, 92 Md. 630.

⁴ *Du Puy's Succession*, 33 La. An. 258. Property in the custody of the law cannot be seized or sold for taxes: *Ex parte Tyler*, 149 U. S. 164; *Virginia, etc. Co. v. Bristol Land Co.*, 88 Fed. Rep. 134; *McRue v. Bowers Dredging Co.*, 90 Fed. Rep. 360; *Yuba County v. Adams*, 7 Cal. 35; *Palmer v. Pettingill* (Idaho), 55 Pac. Rep. 653; *Prince George County v. Clarke*, 36 Md. 206. It was held in *Woodward v. Ellsworth*, 4 Colo. 580, that unless a lien has attached to specific property of a national bank by virtue of a tax levied thereon prior to the bank's insolvency, a collector cannot enforce payment by seizing personalty in the receiver's hands. A tax-collector's constructive seizure of property held under an attachment from a federal court was held good after such attachment had been dissolved: *Bristol v. Murff*, 49 La. An. 357. A personal tax assessed against a corporation cannot be collected in an

action or a proceeding against the corporation's receiver personally: *State v. Red River Valley Elevator Co.*, 69 Minn. 131. Except in an equitable proceeding, and upon proof that they have assets of the railroad in their hands or have diverted its revenues, taxes against a railroad are not collectible from receivers who had the control and management of the property during the years for which such taxes were assessed, as a part of the system owned by the company for which they are receivers, but whose connection with that particular road has ceased: *Comer v. Polk County*, 81 Fed. Rep. 921, 27 C. C. A. 1. Though lands are constructively in the possession of a receiver of a federal court, as a part of the assets of an insolvent corporation, one who has bought such lands at a tax-sale may demand and receive a deed therefor: *Whitehead v. Farmers' L. & T. Co.*, 98 Fed. Rep. 10, 39 C. C. A. 34.

⁵ *Ex parte Tyler*, 149 U. S. 164; *Georgia v. Atlantic, etc. R. Co.*, 3 Woods 434; *First Nat. Bank v. Ewing*, 103 Fed. Rep. 168. Priority of payment is a preference in the appropriation of the proceeds of a debtor's property. As it puts the taxes ahead of other claims it is near of kind to

proof, a receiver will be ordered to satisfy a tax assessed against the property in his hands,¹ and a like direction will be made in other cases where funds are held subject to the authority of a court.² In Maryland it is provided by statute that whenever property is sold by any ministerial officer under judicial process or otherwise, all sums in arrear for taxes from the owner shall first be paid.³

a lien, and may be called a *quasi-lien*: *Degner v. Brown*, 74 Md. 144.

¹ See *Savannah v. Jesup*, 106 U. S. 563; *Union Trust Co. v. Illinois M. R. Co.*, 117 U. S. 434; *Ex parte Tyler*, 149 U. S. 164; *McRue v. Bowers Dredging Co.*, 90 Fed. Rep. 360; *First Nat. Bank v. Ewing*, 103 Fed. Rep. 168; *Lamkin v. Baldwin, etc. Co.*, 72 Conn. 57; *Palmer v. Pettingill (Idaho)*, 55 Pac. Rep. 553; *Greeley v. Provident Sav. Bank*, 98 Mo. 458; *Duryee v. United States Credit System Co.*, 55 N. J. Eq. 311; *Central Trust Co. v. New York C. & N. R. Co.*, 110 N. Y. 250; *Athens County Treasurer v. Dale*, 60 Ohio St. 180. Where a receiver is cited to show cause why taxes on the property in his hands should not be paid, it is "good and sufficient cause," that he has sold the property, which was realty, by the court's order, and that the purchaser has taken it subject to the taxes: *Stoner v. Bitters*, 151 Ind. 175. If receivers have not returned for taxation property held by them, the claim for taxes is not barred by an order limiting the time for presenting claims: *Walters v. Western & A. R. Co.*, 68 Fed. Rep. 1002. Where a corporation's receiver pays in full the interest on its bonded debt without deducting the tax imposed on such interest, the liability for the same continues: *Commonwealth v. Philadelphia & R. C. & I. Co.*, 137 Pa. St. 481. As to payment of taxes by the receiver of the mortgaged property of an insolvent corporation, see *First Nat. Bank v. Illinois Steel Co.*, 174 Ill. 140.

Liability of receiver of insolvent bank for taxes: *Hewitt v. Traders' Bank*, 18 Wash. 326. The Iowa statute making taxes a preferred claim in case of an assignment for the benefit of creditors does not apply to personal property which has passed into a receiver's hands pending litigation concerning the priority of liens sufficient to absorb it: *Howard County v. Strother*, 70 Iowa 593. 71 Iowa 683. A receiver should be allowed credit for valid taxes paid by him, even though he paid them without authority previously obtained: *In re Mont Alto Iron Co. (Pa.)*, 34 Atl. Rep. 638; *Hamacker v. Commercial Bank*, 95 Wis. 359.

² Payment of taxes on personalty by preference out of the proceeds of an insolvent's movable property is rightly ordered: *Mullan v. Creditors*, 39 La. An. 397. As to reaching, by order of court, funds in an assignee's hands, see *Johnson's Petition*, 104 Ill. 50; *Loeber v. Leininger*, 175 Ill. 484. *Milwaukee v. Momsen*, 89 Wis. 351. Order directing payment of collateral-inheritance tax: *In re Miller*, 110 N. Y. 216.

³ See *Perkins v. Gaither*, 70 Md. 134; *Degner v. Brown*, 74 Md. 144. Taxes on a stock of goods, part of which has been attached and sold, must be paid out of the proceeds of sale notwithstanding a claim that they should be collected in whole or in part from the residue of the stock which has been attached and sold in another suit brought in a different court: *Degner v. Brown*, 74 Md. 144.

Collection by personal action. It has been shown in preceding pages that taxes are not debts in the ordinary sense, and that therefore an action will not in general lie to recover them.¹ This rule is not, however, universal; for sometimes the implication of an intent to give a remedy by suit may be so strong as to be conclusive; as where the statute provides for a tax, but is silent as to the method of collection.² Some-

The same case holds that city as well as state taxes have priority under the statute. And in *Perkins v. Gaither*, 70 Md. 134, it was held that the statute does not deprive one of the right of resisting the payment of a tax which, having been levied more than four years before the sale, is barred.

¹ *Ante*, pp. 17-19. In some jurisdictions, however, a tax is regarded as a debt for which, in the absence of some express or implied prohibition in the written law, a personal judgment may be recovered, even though the statute prescribes specific modes of collection: see *Nashville v. Cowan*, 10 Lea 209; *State v. Memphis & C. R. Co.*, 14 Lea 56; *State v. Evansville Sav. Bank*, 16 Lea 111; *Henrietta v. Eustis*, 87 Tex. 14. See, also, *Torrey v. Willard*, 55 Hun 78. And in some states the laws provide that taxes are to be deemed debts and shall be sued for as such: see *State v. Travelers' Ins. Co.*, 70 Conn. 590; *Boody v. Watson*, 64 N. H. 162. It is held in *Turnpike Com'rs v. Louisville & N. R. Co. (Ky.)*, 1 S. W. Rep. 671, that the assessment or collection of taxes is not an inherent power of the judiciary, and that where suit for a tax is not authorized by statute it cannot be maintained.

² *State v. Snyder*, 139 Mo. 549. See *Perry County v. Railroad Co.*, 58 Ala. 546; *Anniston v. Southern R. Co.*, 112 Ala. 557; *Worthen v. Quinn*, 52 Ark. 82; *San Francisco Gas Co. v. Brickwell*, 62 Cal. 641; *State v. New*

York, N. H. & H. R. Co., 60 Conn. 326; *Haas v. Misner*, 2 Idaho 174; *Dubuque v. Illinois Central R. Co.*, 39 Iowa 56; *Burlington v. Burlington & M. R. Co.*, 41 Iowa 134; *Marshall County v. Knoll*, 102 Iowa 573; *Slack v. Ray*, 26 La. An. 674; *Irwin's Succession*, 33 La. An. 63; *Reed v. His Creditors*, 39 La. An. 115; *Baltimore v. Howard*, 6 H. & J. 383; *Eyke v. Lange*, 104 Mich. 26; *State v. Severance*, 55 Mo. 378; *State v. Tittman*, 103 Mo. 569; *Humboldt County v. Lander County*, 24 Nev. 461; *Gatling v. Com'rs*, 92 N. C. 536; *Mayor v. McKee*, 2 Yerg. 167; *Rutledge v. Fogg*, 3 Cold. 554; *Memphis v. Looney*, 9 Baxt. 130; *State v. Williams*, 8 Tex. 384; *Houston, etc. R. Co. v. State*, 39 Tex. 149. *Territory v. Reyburn*, McCahon 134. The state may maintain an action against a city to recover taxes upon its wharf property, as such property cannot be seized and sold by a tax-collector: *Commonwealth v. Louisville (Ky.)*, 47 S. W. Rep. 865. So a county treasurer can replevy property to enforce a tax-lien thereon, where the property is in a third person's possession; there being no statutory remedy in such case: *Reynolds v. Fisher*, 43 Neb. 172. A statute providing for the collection of a tax upon bank stock by means of a proceeding *in rem* against the stock itself, or by means of a warrant, was held not to exclude an action by the tax-receiver, the remedies mentioned being inadequate, standing alone: *McLean v. Myers*, 134 N. Y.

times, also, a right to bring suit is expressly given,¹ and where it is the statute must be followed closely, and any conditions

480. It was held in *State v. Tittman*, 103 Me. 569, that taxes against the personal estate of a decedent, whether they accrued before or after his death, are "demands" which it is the administrator's duty to pay without presentation or allowance, and for which, if he fails to pay for them, an action may be maintained. Taxes against a decedent's estate in Maine are a preferred claim, and may be collected by action without being proved before commissioners: *Bulfinch v. Benner*, 64 Me. 404. It is, however, held in *Millett v. Early*, 16 Neb. 266, that where by statute taxes are to be collected as in case of execution, a claim in the case of a tax against an estate must be presented for allowance.

¹ This may be done even as to taxes laid before the enactment of the statute giving the right: *York v. Goodwin*, 67 Me. 260. A statute authorizing the recovery by suit of invalid assessments was held not to be an usurpation of judicial authority as overturning past decisions of the courts: *Nottage v. Portland*, 35 Or. 539. Statute authorizing city to collect taxes by suit held to give a remedy concurrent with existing summary method of collection by distraint, neither excluding the other: *Greer v. Covington*, 83 Ky. 410. Statutory remedy for collection of city taxes by action in city's name held to be cumulative, and not to impair right to maintain action therefor in name of state: *State v. Cummings*, 151 Mo. 49. The right to bring suit is not taken away by a new constitutional provision for collection in another mode so long as the statutes which allow suit remain unrepealed: *New Orleans v. Wood*, 34 La. An. 732; *Saloy v. Woods*, 40 La. An. 585. A county may sue to recover taxes paid

into its treasury and illegally refunded by its officers: *Polk County v. Sherman*, 99 Iowa 60. A statute giving a suit for taxes against any one who should remove out of the precinct after assessment applied to the case of one who left with the intention of returning after six months: *Houghton v. Davenport*, 23 Pick. 235. But one cannot be made liable for a tax assessed after he has removed from the municipality, even though the vote granting the money was had while he was a resident: *Ware v. First Parish*, 8 Cush. 267. As to proceedings against non-residents, see, also, *McLean v. Myers*, 134 N. Y. 480; *New York, etc. R. Co. v. Lyon*, 16 Barb. 651; *Dawson v. Croisan*, 18 Or. 431. An action at law will not lie against the cashier of a national bank who fails to pay the tax imposed upon the shares of the bank's capital stock; but an action will lie against the bank for the collection of such tax: *Muskegon v. Lange*, 104 Mich. 19; *Eyke v. Lange*, 104 Mich. 26. In Illinois, where there has been a forfeiture of lands for taxes due thereon, an action of debt lies, under the statute, against the owner of the land to recover such taxes: *Sanderson v. La Salle*, 117 Ill. 171; *Carrington v. People (Ill.)*, 63 N. E. Rep. 163. Further as to the statutory right to collect taxes by suit, see *Savings Bank v. United States*, 19 Wall. 227; *State v. Adler*, 123 Ala. 87; *San Luis Obispo County v. White*, 91 Cal. 432; *Los Angeles County v. Ballerino*, 99 Cal. 593; *People v. Ballerino*, 99 Cal. 598; *San Diego County v. Southern Pac. R. Co.*, 108 Cal. 46; *Meyer v. Burritt*, 59 Conn. 117; *Hart v. Tiernan*, 59 Conn. 521; *Dalby v. People*, 124 Ill. 66; *Johnston v. Louisville*, 11 Bush 527; *Central R. & B. Co. v. Commonwealth (Ky.)*, 49 S. W. Rep. 456; *Somer-*

which are named must be observed.¹ Taxes assessed upon lands cannot be collected by a personal action against the

set v. Somerset Bank (Ky.), 60 S. W. Rep. 5; Louisville Bridge Co. v. Louisville (Ky.), 65 S. W. Rep. 814; Campbell County v. Newport & C. Bridge Co. (Ky.), 66 S. W. Rep. 526; State v. Meyer, 41 La. An. 436; Rivers v. New Orleans, 42 La. An. 1196; Lord v. Parker, 83 Me. 530; Rockland v. Ulmer, 89 Me. 381; Auditor-General v. Lake George & M. R. Co., 82 Mich. 426; Eyke v. Lange, 90 Mich. 592. 104 Mich. 26; Bangor T'p v. Smith Transp. Co., 112 Mich. 601; Deerfield T'p v. Harper, 115 Mich. 678; Menominee v. Martin Lumber Co., 119 Mich. 201; State v. Adler, 68 Miss. 487; State v. Hill, 70 Miss. 106; State v. Fragiaco, 70 Miss. 799; Yazoo & M. V. R. Co. v. West, 78 Miss. 789; State v. Hamilton, 94 Mo. 544; State v. Tittman, 103 Mo. 569; St. Joseph v. Kansas City, St. J. & C. B. R. Co., 118 Mo. 671; Mexico v. Canthorn, 25 Mo. App. 285; Hoover v. Engles (Neb.), 88 N. W. Rep. 869; Shriver v. Cowell, 92 Pa. St. 262; Philadelphia v. Hiester, 142 Pa. St. 39; State v. Tennessee Coal, I. & R. Co., 94 Tenn. 295; Henrietta v. Eustis, 87 Tex. 14; Kerr v. Woolley, 3 Utah 456.

¹ Du Bignon v. Brunswick, 106 Ga. 317; Bordages v. Higgins, 1 Tex. Civ. App. 43. Where the statute provides that suit may be brought for taxes that have remained for a certain time unpaid, suit cannot be brought earlier: Ricker v. Brooks, 155 Mass. 400; State v. Robyn, 92 Mo. 395. As to the necessity of having a certain return or verified statement of unpaid taxes before suit can be brought, see San Diego County v. California South. Pac. R. Co., 65 Cal. 282; McCallum v. Bethany T'p, 42 Mich. 457; Port Huron T'p v. Potts, 78 Mich. 435; Muskegon v. Martin Lumber Co., 86 Mich. 625; Bangor T'p v. Smith Transp. Co., 106 Mich. 223; North-

western C. & L. Co. v. Scott, 123 Mich. 357; Duff v. Neilson, 90 Mo. 93. Issue and return of warrant unsatisfied, held not a condition precedent to action for delinquent personalty tax: McLean v. Myers, 134 N. Y. 480. Non-residence of delinquent taxpayer as a condition precedent: Chrigstrom v. McGregor, 74 Hun 343. As to direction by the proper authorities to begin suit, see Cape Elizabeth v. Boyd, 86 Me. 317; Orono v. Emery, 86 Me. 362; Rockland v. Ulmer, 87 Me. 357; Wellington v. Small, 89 Me. 155; Charleston v. Lawry, 89 Me. 582; Dallas Title, etc. Co. v. Oak Cliff, 8 Tex. Civ. App. 217. As to demand, before bringing suit, that tax be paid, see Hart v. Tiernan, 59 Conn. 521; Kentucky Central R. Co. v. Pendleton County (Ky.), 2 S. W. Rep. 176; Parks v. Cressey, 77 Me. 54; Rockland v. Ulmer, 87 Me. 357; Miller v. Davis, 88 Mo. 454; Dover v. Maine Water Co., 90 Me. 180; McLean v. Manhattan Medicine Co., 54 N. Y. Super. Ct. 371; Austin v. Westchester Tel. Co., 8 Misc. Rep. 11, 27 N. Y. Supp. 77. Sufficiency of demand before action brought for taxes on withheld property: Bell v. Stevens (Iowa), 90 N. W. Rep. 87. Where the statute provided a special remedy for the collection of a personal tax by suit, and a mode of reviewing the judgment, it was held that the party was confined to this mode of review: Washington County v. German American Bank, 28 Minn. 360. It was held in Menominee v. Martin Lumber Co., 119 Mich. 201, that although the city treasurer's power is limited by the statute to the person "to whom the tax is assessed," a city may recover against the owner of personalty which has been assessed for a valid tax to the wrong person.

owner unless they are by law made a charge against him.¹ In some states it has been held that a tax may be collected by garnishing the creditor of the delinquent.²

The requisites of the pleadings in suits for the collection of taxes are considered in the cases cited in the marginal note.³

¹ *Dreake v. Beasley*, 26 Ohio St. 315. In Massachusetts, a statute providing that suit may be brought "when a person neglects to pay his tax," cannot, it is held, be construed to exclude taxes on real estate, especially as such taxes are assessed not to the estate, but to the person who is owner or in possession: *Richardson v. Boston*, 148 Mass. 508. In Missouri a land-tax creates no personal liability against the owner of the land: *Milner v. Shipley*, 94 Mo. 106; *Blevins v. Smith*, 104 Mo. 583; *State v. Snyder*, 139 Mo. 549. So in Nebraska: *Grant v. Bartholemew*, 57 Neb. 673; 58 Neb. 839; *Carman v. Harris*, 61 Neb. 635; *Toy v. McHugh* (Neb.), 87 N. W. Rep. 1059; *Philadelphia Mortg. & T. Co. v. Omaha* (Neb.), 88 N. W. Rep. 523; *Kelley v. Wehn* (Neb.), 88 N. W. Rep. 682. There is no personal liability in Kentucky for the cost of street improvements: *Meyer v. Covington*, 103 Ky. 608; *Barker v. Southern Const. Co.* (Ky.), 47 S. W. Rep. 608. Non-resident owner cannot be made personally liable for assessments: *Dewey v. Des Moines*, 173 U. S. 193; *New York v. McLean* (N. Y.), 63 N. E. Rep. 380.

² *State v. McAllister*, 60 Ala. 105; *Wilmington v. Sprunt*, 114 N. C. 310. The latter case holds that garnishment proceedings by a city tax-collector do not deprive the delinquent of due process of law, where the charter fixes the time and place for listing taxes, and he has had an opportunity to have the amount, if erroneous, corrected; nor, in such proceedings, can the garnishee complain that the delinquent did not have his "day in court." Under a statute au-

thorizing a sheriff to institute garnishment proceedings for the collection of taxes "if he believes he cannot otherwise collect the tax," it will be presumed, in support of such proceedings, that he did so believe where the taxes were past due and the taxpayer was denying his liability: *Broadway Christian Church v. Commonwealth* (Ky.), 66 S. W. Rep. 32.

³ It is said in *Charleston v. Lawry*, 89 Me. 582, that in a suit at law for the mere recovery of unpaid taxes, much less particularity and precision are required than in proceedings wherein a forfeiture for non-payment is sought to be enforced. In *People v. Central Pac. R. Co.*, 83 Cal. 393, it is held that as tax proceedings are *in invitum*, and must, to be valid, be *stricti juris*, a complaint in an action for taxes should show upon its face sufficient to make out a *prima facie* case of valid tax, and that such tax is delinquent. The declaration in an action of debt to recover delinquent taxes must state facts from which it will appear that the tax claimed is due; and the statement must not be of conclusions at law: *People v. Davis*, 112 Ill. 272. But such a declaration need not aver by what authority the taxes were levied, or the particular municipality to which they were payable: *Ottawa Gas-Light Co. v. People*, 138 Ill. 336. A complaint for the recovery of taxes during a series of years must allege the amount of the taxes due, when they are payable, and, where the levy was not the same each year, the amount thereof for each respective year: *Board of Mississippi Levee*

Sometimes the tax-roll is made *prima facie* evidence of the legality and regularity of the assessment,¹ and the like effect may be given to properly certified tax-bills.² Of course the burden is upon the plaintiff to show whatever is necessary to

Com'rs v. Yazoo & M. V. R. Co. (Miss.), 25 South. Rep. 664. Where a declaration for delinquent taxes upon a leasehold describes the property as "a certain leasehold real estate and the improvement thereon, on lot 1 in block 12 1-2 of " a certain subdivision, etc., it is sufficiently definite: *Carrington v. People* (Ill.), 63 N. E. Rep. 163. The complaint, in an action against an agent for taxes against his principal, must show that a recovery is sought under the statute which provides for such action: *State v. Sloss*, 87 Ala. 119. A bill filed under the statute allowing a collector to sue in his own name for a tax which has remained unpaid for three months after being committed to him must contain an allegation showing that such tax has so long remained unpaid: *Ricker v. Brooks*, 155 Mass. 400. It is competent for the legislature to prescribe the form of complaint to be used in an action by a city to recover delinquent taxes: *Stockton v. Western F. & M. Ins. Co.*, 73 Cal. 621. Further as to the complaint or declaration in actions for the collection of taxes, see *Bays v. Lapidge*, 52 Cal. 481; *Santa Barbara v. Eldred*, 95 Cal. 378; *People v. Ballerino*, 99 Cal. 598; *People v. Winkelman*, 95 Ill. 412; *Biggins v. People*, 96 Ill. 382; *Bowman v. People*, 114 Ill. 474; *Ottawa Gas-Light & C. Co. v. People*, 138 Ill. 336; *Carrington v. People* (Ill.), 63 N. E. Rep. 163; *Cressy v. Parks*, 76 Me. 532; *Rockland v. Ulmer*, 84 Me. 503; *Wellington v. Small*, 89 Me. 154; *Mason v. Belfast Hotel Co.*, 89 Me. 381, 384; *Charleston v. Lawry*, 89 Me. 582; *State v. Renshaw* (Mo.), 66 S. W. Rep. 953; *Ithaca v. Cornell*, 75 Hun 425; *Swenson v. Green-*

land, 4 N. D. 533; *Wheeler v. Wilson*, 57 Vt. 157. As to what is covered by the plea of the general issue, see *Orono v. Emery*, 86 Me. 362. Where an action for delinquent taxes is defended on the ground that property was fraudulently assessed in excess of its value, the answer must show payment or tender of the amount which would have been due if the property had been assessed fairly, and must offer to pay what shall be found equitable: *Los Angeles County v. Ballerino*, 99 Cal. 593.

¹ See *San Gabriel Valley, etc. Co. v. Witmer Bros. Co.*, 96 Cal. 623; *Howe v. Moulton*, 87 Me. 120; *Hood v. Judkins*, 61 Me. 575; *Muskegon v. Martin Lumber Co.*, 86 Mich. 215; *Jefferson's Estate*, 35 Minn. 215. See *Sherley v. Louisville* (Ky.), 53 S. W. Rep. 530. Where the state made the tax-roll *prima facie* evidence of the legality and regularity of the assessment of the tax, and provided that in a suit thereon judgment should be rendered against the person taxed unless he proved payment, it was held that the defendant might nevertheless disprove the *prima facie* case of liability: *Wattles v. Lapeer*, 40 Mich. 624. See *San Francisco v. Phelan*, 61 Cal. 617. As to the *prima facie* case made by the return of delinquent taxes, see *ante*, pp. 827, 828.

² See *Louisville v. Cochran*, 82 Ky. 15; *Crecelius v. Louisville* (Ky.), 49 S. W. Rep. 547; *Sherley v. Louisville* (Ky.), 53 S. W. Rep. 530; *Reed v. Louisville* (Ky.), 61 S. W. Rep. 11; *State v. Scott*, 96 Mo. 72; *Keith v. Bingham*, 100 Mo. 300; *State v. Hurt*, 113 Mo. 90; *State v. Hannibal & St. J. R. Co.*, 113 Mo. 297; *State v. Maloney*, 113 Mo. 367; *State v. Davis*, 131

constitute the cause of action;¹ but often the statute throws upon the defendant the burden of establishing any irregularity or defect in the proceedings which would constitute a defense.²

Where a suit for collection is allowed, the general statute of limitations is in most jurisdictions held not applicable,³ although in certain states a different rule prevails.⁴ And if the statute

Mo. 457; *State v. Cunningham*, 153 Mo. 642; *State v. Merchants' Bank*, 160 Mo. 640; *Heman v. Payne*, 27 Mo. App. 481. Averments in answer held to place upon city the burden of showing that the tax-bills were made out and signed by the assessor: *Louisville v. Johnson*, 95 Ky. 254; *Reccius v. Louisville (Ky.)*, 66 S. W. Rep. 410; *Louisville v. Kimbel (Ky.)*, 66 S. W. Rep. 608.

¹ Thus a sheriff suing executors for taxes assessed on property alleged to have been omitted from the list of taxable property has the burden of proving that decedent owned the property during the years for which the taxes are claimed: *Butler v. Watkins's Ex'rs (Ky.)*, 27 S. W. Rep. 995.

² See *Sherrill v. Hewitt*, 59 Hun 619. A defendant disputing, in an action for collection, the finality of the valuation of his property, on the ground that he applied for a revaluation, must show that he made such application: *State v. Tennessee C. & I. & R. Co.*, 94 Tenn. 295.

³ *Greenwood v. La Salle*, 137 Ill. 225; *Hoover v. Engles (Neb.)*, 88 N. W. Rep. 869; *Wasteney v. Schott*, 58 Ohio St. 410. See *Hagerman v. Territory (N. M.)*, 66 Pac. Rep. 526; *Wilmington v. Cronly*, 122 N. C. 383; *Iowa Land Co. v. Douglas County*, 8 S. D. 491; *Port Townsend v. Eisenbeis (Wash.)*, 68 Pac. Rep. 1045. In the case first cited an action by an Illinois town to recover taxes due on forfeited property was held not an action on a judgment so as to make

the period of limitation twenty years. In Louisiana, although the liens and privileges resulting from taxes are prescriptible, the taxes themselves are imprescriptible, and the tax-debtor remains indebted: *Stewart's Succession*, 41 La. An. 127; *Leeds & Co. v. Hardy*, 43 La. An. 810; *Hood v. New Orleans*, 49 La. An. 1461; *Miramón v. New Orleans*, 52 La. An. 1623.

⁴ See *Bristol v. Washington County*, 177 U. S. 147; *San Francisco v. Jones*, 20 Fed. Rep. 188; *Perry County v. Railroad Co.*, 58 Ala. 546; *San Francisco v. Luning*, 73 Cal. 610; *San Diego v. Higgins*, 115 Cal. 170; *Redwood County v. Winona & St. P. L. Co.*, 40 Minn. 512; *Mower County v. Crane*, 51 Minn. 201; *Pine County v. Lambert*, 57 Minn. 203; *State v. Norton*, 59 Minn. 424; *State v. Ward*, 79 Minn. 362; *Board of Com'rs v. Story (Mont.)*, 69 Pac. Rep. 56; *State v. Mining Co.*, 14 Nev. 220; *Union & P. Bank v. Memphis*, 101 Tenn. 154; *Mellinger v. Houston*, 68 Tex. 36. In Texas a city charter allowing persons liable to the city for taxes to plead in bar of suit therefor the four-year period of limitation was held void so far as applicable to pending suits: *Ollivier v. Houston*, 93 Tex. 201. A statute providing that no delinquent taxpayer shall have the right to plead or rely upon any statute of limitations by way of defense against the payment of taxes applies to a purchaser of property encumbered with a lien for taxes: *Mellinger v. Houston*, *supra*. An act providing

of limitations has been suspended as to taxes due a state or county, mere lapse of time cannot be set up to defeat the recovery of such taxes.¹ It will be a good defense that the statute is for any reason illegal,² but mere irregularities may be overlooked, as they would be in a suit to recover back the amount after judgment.³ Inequalities in an assessment are

that failure to collect taxes within four years may be pleaded in bar of recovery does not apply where a court of equity has taken jurisdiction of the property liable for the taxes: *Hebb v. Moore*, 66 Md. 167. Nor does such act apply where the collector cannot, because of the actual *situs* of the property taxed, enforce payment by distress and sale: *Baldwin v. State*, 89 Md. 587. Period of limitation of recovery for taxes against decedents' estates: *Rich v. Tuckerman*, 121 Mass. 222. Period of limitation in case of assessments for escaped taxes: *Calhoun County v. Woodstock Iron Co.*, 82 Ala. 151. As to when the statute of limitations begins to run against the recovery of taxes, see *Louisville v. Johnson*, 95 Ky. 254; *Louisville & J. Ferry Co. v. Commonwealth (Ky.)*, 57 S. W. Rep. 626; *In re Southern Wood Manuf. Co.*, 49 La. An. 926; *Gowland v. New Orleans*, 52 La. An. 2042; *Condon v. Maynard*, 71 Md. 601; *State v. Sage*, 75 Minn. 448; *Pierce County v. Merrill*, 19 Wash. 175. Against taxes assessed for omitted years, limitations do not run until such taxes have become delinquent: *State v. Fullerton*, 143 Mo. 682. Interruption of period by litigation and agreement: *Masonic Temple Assoc. v. Pflanz (Ky.)*, 52 S. W. Rep. 821; *In re Southern Wood Manuf. Co.*, 49 La. An. 926. Subsequent promise to pay taxes takes them out of the operation of statute of limitations: *Perkins v. Dyer*, 71 Md. 421; *Georgetown Coll. v. Perkins*, 74 Md. 72. When the statute has run against a corporation for taxes and penalties, neither can be "lawfully demanded"

within the meaning of a statute providing that the state comptroller, in revising an account of taxes, shall exclude taxes and other charges which could not so be demanded: *People v. Roberts*, 157 N. Y. 70. It was held in *Levy v. Wilcox*, 96 Wis. 127, that where taxes void because of defects going to the invalidity of the assessment are joined with other taxes which a court of equity would require paid as terms of granting relief against the illegal taxes, such joinder will not prevent the running of the statute of limitations as to such illegal taxes. A charter limitation of suits to recover taxes was held not applicable to city's petition claiming an amount due for taxes on a certain lot in proceedings by school-land commissioner to sell such lot, in which proceedings the former owner was seeking to redeem under a provision requiring him to pay all taxes in order to redeem: *Tebbetts v. Charleston*, 33 W. Va. 705. Statutes of limitation are not statutes of release or liquidation, so as to be forbidden by the constitution: *Board of Com'rs v. Story (Mont.)*, 69 Pac. Rep. 56.

¹*State v. Gibson (Tex. Civ. App.)*, 65 S. W. Rep. 690.

²If, for example, the taxes were not assessed and put upon the roll in the manner and by the officer provided by the statute: *State v. Vicksburg Bank*, 69 Miss. 99.

³*Houston County Com'rs v. Jesup*, 22 Minn. 552; *State v. Northern Belle Mining Co.*, 15 Nev. 385. In Illinois it is held that an action of debt may be maintained by a town

not a defense,¹ although fraud by the assessors or board of review in making or revising the assessment may be.² That the party was not subject to the taxing jurisdiction is always a defense.³ But it is no defense to a legal tax that the party has paid other assessments which were illegal.⁴ The pendency of a criminal prosecution for the non-payment of a license-tax has been held not to be a defense to an action for the recovery of such tax.⁵ Nor is it a defense, in an action to recover taxes levied to pay judgments against a city, that the city has paid the judgments.⁶ The legislature, it has been held, has the power to provide that a former recovery shall not constitute a defense to an action to recover taxes.⁷ And it is the conclusion of many cases that irregularities or defects in the organization of a *de facto* municipality cannot avail as a defense in an action by such municipality for the collection of taxes levied by it.⁸

for taxes although a tax-title founded on a forfeiture of land would be adjudged void for irregularities in the proceeding: *Sanderson v. La Salle*, 117 Ill. 171. And in Maine mere irregularities in the previous procedure which do not work any injustice or hardship to the taxpayer, and which he did not seek to have corrected on appeal or *certiorari*, are not a bar to a suit for taxes: *Lord v. Parker*, 83 Me. 530; *Rockland v. Ulmer*, 84 Me. 503, 87 Me. 357; *Foxcroft v. Piscataquis Valley Camp-Meeting Assoc.*, 86 Me. 78; *Rockland v. Farnsworth*, 86 Me. 533; *Mason v. Belfast Hotel Co.*, 89 Me. 381.

¹ *Potosi v. Casey*, 27 Mo. 372.

² *State v. Cunningham*, 153 Mo. 642; *State v. Central Pac. R. Co.*, 7 Nev. 99; *Western R. Co. v. Nolan*, 48 N. Y. 513.

³ *McCrillis v. Mansfield*, 64 Me. 198. It is held in *State v. Tennessee C. & R. Co.*, 94 Tenn. 295, that upon the trial of a suit brought by a tax-collector under direction of the judge or chairman of the county court, for the collection of taxes against a property-owner who denies the right to tax his property, all

questions bearing upon that right may be inquired into.

⁴ *Wayne v. Savannah*, 56 Ga. 448; *Railroad Co. v. Brunswick County*, 72 N. C. 10; *Bridge Co. v. New Hanover County*, 72 N. C. 15; *Railroad Co. v. Brogden*, 74 N. C. 707; *Railroad Co. v. Alamance County*, 82 N. C. 259.

⁵ *Heller v. Alvarado*, 1 Tex. Civ. App. 409.

⁶ *State v. Hamilton*, 94 Mo. 544.

⁷ *State v. Central Pac. R. Co.*, 21 Nev. 360.

⁸ *Ante*, p. 8. In a suit to recover taxes levied by a city which has assumed, under the statute, control of its schools, the validity of its taxes cannot be questioned on the ground that the school district was illegal: *El Paso v. Ruckman*, 92 Tex. 86. In an action by a contractor to foreclose an assessment lien, the legality of the city's incorporation cannot be attacked: *Willard v. Albertson*, 23 Ind. App. 162, 164. The constitutionality of a statute providing the method of creating municipal corporations, and the organization of the municipal corporation under the act, cannot be attacked

On the other hand, in a proceeding to recover taxes from a corporation, the regularity of the corporate existence cannot be attacked, although the immunities claimed under its charter may be questioned.¹ Unless by express provision of statute set-off is not allowed in suits for taxes.²

In actions for the collection of taxes interest is not recoverable unless expressly allowed by statute,³ nor can any recovery be had without proof of such proceedings as are essential to

collaterally by one who is resisting a tax claimed by the corporation: *Chicago, St. L. & N. O. R. Co. v. Kentwood*, 49 La. An. 931. And see *Independent Dist. v. Taylor*, 100 Iowa 617; *Lake Charles v. Police Jury*, 50 La. An. 346; *Sage v. Plattsmouth*, 48 Neb. 558, following *South Platte Land Co. v. Buffalo County*, 15 Neb. 605. But persons cannot, by proof of the existence of a corporation *de facto*, be deprived of their property without a hearing or opportunity to be heard before a competent tribunal: *Reclamation Dist. v. Burger*, 122 Cal. 442.

¹ *State v. Planters' F. & M. Ins. Co.*, 95 Tenn. 203.

² *Ante*, p. 20. See, also, *Fitzhugh v. Cotton Belt Levee Dist.*, 54 Ark. 224; *Otis v. People (Ill.)*, 63 N. E. Rep. 1053; *Somerset v. Somerset Bank Co. (Ky.)*, 60 S. W. Rep. 5. It was held in *Louisville & N. R. Co. v. Commonwealth (Ky.)*, 30 S. W. Rep. 624, that a railroad company sued for taxes could plead as a set-off an excess of taxes previously paid by mistake.

³ *Ante*, p. 20; *Kentucky Central R. Co. v. Pendleton County (Ky.)*, 2 S. W. Rep. 176; *Louisville & N. R. Co. v. Hopkins County*, 87 Ky. 605; *United States Trust Co. v. Territory (N. M.)*, 62 Pac. Rep. 987; *Cave v. Houston*, 65 Tex. 619. The same is true of special assessments for local improvements: *Sargent v. Tuttle*, 67 Conn. 162; *Mall v. Portland*, 35 Or. 89. An ordinance providing for the

collection of interest on a special tax for a period longer than the statute authorizes is invalid: *Western Springs v. Hill*, 177 Ill. 634. For decisions upon questions arising under statutes providing for interest upon unpaid taxes, or upon judgments for delinquent taxes, see *Harrison v. United States*, 20 Ct. of Cl. 175; *Jebeles v. State*, 117 Ala. 174; *People v. Central Pac. R. Co.*, 105 Cal. 576; *Hartford v. Hills*, 72 Conn. 599; *Greenwood v. La Salle*, 137 Ill. 225; *State v. Frazier*, 113 Ind. 267; *Evansville & T. H. R. Co. v. West*, 139 Ind. 254; *Greer v. Covington*, 83 Ky. 410; *Louisville & N. R. Co. v. Commonwealth (Ky.)*, 30 S. W. Rep. 624; *Cumberland & P. R. Co. v. State*, 92 Md. 668; *Needham v. Norton*, 146 Mass. 476; *Jackson Fire Clay, etc. Co. v. Snyder*, 93 Mich. 325; *State v. Baldwin*, 62 Minn. 518; *Vicksburg Bank v. Adams*, 74 Miss. 179; *Illinois Central R. Co. v. Adams (Miss.)*, 29 South. Rep. 996; *Bambrick v. Campbell*, 37 Mo. App. 460; *State v. Marvin*, 51 N. J. L. 298; *Wilmington v. Cronly*, 122 N. C. 388; *United States Trust Co. v. Territory, supra*; *Lufkin v. Galveston*, 73 Tex. 340; *State v. Whittlesey*, 17 Wash. 447; *New Whatcom v. Roeder*, 22 Wash. 570. Under the Illinois statute a judgment for forfeited taxes may include all prior forfeited taxes on the real estate, with penalties, costs, and interest: *Carrington v. People (Ill.)*, 63 N. E. Rep. 163.

the making out of a legal tax and a default in payment.¹ Judgment is to be rendered against the person taxed, though he may have parted with the property in respect of which he was assessed,² or even though the property may have been destroyed accidentally.³ A judgment for taxes for a gross sum, not distinguishing between state taxes and county taxes, has been held to be erroneous;⁴ but where a tax in part legal and in part illegal is capable of definite apportionment, judgment may be given for that part which might lawfully be levied.⁵

Judgments for taxes in which the sums are expressed in figures without a dollar-mark prefixed have been declared void for uncertainty,⁶ but by some courts have been sustained.⁷

Upon the question whether a judgment establishing a liability to pay taxes for certain years is, in a subsequent action

¹ St. Anthony, etc. Co. v. Greeley, 11 Minn. 321; State v. Vicksburg Bank, 69 Miss. 99; Thompson v. Gardner, 10 Johns. 404; Lockhart v. Houston, 58 Tex. 317. Compare Kinsworthy v. Mitchell, 21 Ark. 145; Garbaldi v. Jenkins, 27 Ark. 453. A perfectly correct assessment does not carry with it the validity of subsequent proceedings in the enforcement of a tax: Genella v. Vincent, 50 La. An. 956. Courts and other officers charged with levying taxes proceed not as judicial tribunals, but *in invitum*, and their determination therein is not a final and conclusive judgment; their action is only *prima facie* correct: State v. Hannibal & St. J. R. Co., 135 Mo. 618.

² Laketon T'p v. Akeley, 74 Mich. 695; Jefferson City v. Mock, 74 Mo. 631; State v. Kenrick, 159 Mo. 631; Everson v. Syracuse, 29 Hun 485. A husband is not liable personally for taxes on lots owned by his wife, though occupied by them both as their homestead: Richards v. Tarr, 42 Kan. 547. A tax assessed against the defendant "and wife" may be recovered in an action of debt against the defendant alone, if the non-joinder of the wife be not

pleaded in abatement: Topsham v. Blondell, 82 Me. 152. A Kentucky city of the first class is precluded by the terms of the statute from rendering a personal judgment against a married woman: Reed v. Louisville (Ky.), 61 S. W. Rep. 11.

³ Farrell v. United States, 99 U. S. 221. A land-owner having died insolvent with taxes in arrears, crops raised on the land by the family the next season cannot be taken for such taxes: Gregory v. Wilson, 52 Ind. 233.

⁴ Lake County v. Sulphur Bank Quicksilver Mining Co., 68 Cal. 14.

⁵ Nalle v. Austin, 91 Tex. 424.

⁶ Woods v. Freeman, 1 Wall. 398; Coombs v. O'Neal, 1 MacA. 405; Lawrence v. Fast, 20 Ill. 338; Lane v. Bommelman, 21 Ill. 143; Eppinger v. Kirby, 23 Ill. 521, 523; Dukes v. Rowley, 24 Ill. 210; Chickering v. Faile, 38 Ill. 342; Cook v. Norton, 43 Ill. 391; Potwin v. Oades, 45 Ill. 366; Elston v. Kennicott, 46 Ill. 187; Pittsburg, etc. R. Co. v. Chicago, 53 Ill. 80; Randolph v. Metcalf, 6 Cold. 400, 408.

⁷ Gutzwiller v. Crowe, 32 Minn. 70, distinguishing Tidd v. Rines, 26 Minn. 201.

between the same parties, *res adjudicata* as to the liability for taxes of a succeeding year when the facts affecting the liability are the same in the two cases, the authorities do not agree. It is held in Iowa, Kentucky, Michigan, Mississippi, and Tennessee, that the judgment for a tax is conclusive as to that tax merely, and in suits for taxes of other years is important only as a precedent.¹ Recent decisions of the federal supreme court maintain the contrary doctrine,² but have not met the approval of the state tribunals.³ Of course an adjudica-

¹ Davenport v. Chicago, R. I. & P. R. Co., 38 Iowa 633, 640; Newport v. Commonwealth (Ky.), 50 S. W. Rep. 845, 51 S. W. Rep. 433; Louisville Bridge Co. v. Louisville (Ky.), 58 S. W. Rep. 598, 65 S. W. Rep. 814; Michigan Southern & N. I. R. Co. v. Auditor-General, 9 Mich. 448; Lake Shore & M. S. R. Co. v. People, 46 Mich. 193; Adams v. Yazoo & M. V. R. Co., 77 Miss. 194; State v. Bank of Tennessee, 95 Tenn. 222; State v. Bank of Commerce, 95 Tenn. 231; Union, etc. Bank v. Memphis, 101 Tenn. 154. See Henderson Bridge Co. v. Henderson, 105 Ky. 32. The case in 38 Iowa is said to be overruled or qualified by Goodenow v. Litchfield, 59 Iowa 226; but the latter case expressly distinguishes the former, and points out that while the former was a proceeding by the taxing power to collect taxes, the latter is a suit between individuals for reimbursement for taxes paid. It was held in Newport v. Masonic Temple Assoc. (Ky.), 45 S. W. Rep. 881, that a judgment determining the right to the exemption under the charter as it existed prior to the adoption of a new constitution is not conclusive as to the right to the exemption for subsequent years under the charter as amended by such constitution. In Ohio & M. R. Co. v. Highway Com'rs, 117 Ill. 279, a judgment against land for taxes was held not to be conclusive in a personal action for those taxes. And it was decided in People v. Chicago &

A. R. Co., 140 Ill. 210, that under a statute providing that when a tax on property liable to taxation is by any erroneous proceeding prevented from being collected for any year or years, the amount of such tax may be added to the tax on such property for any subsequent year, a judgment rendered in a delinquent taxpayer's favor on account of informality in the assessment is no bar to an application for judgment for the same taxes the next year. In Board of Directors v. People, 189 Ill. 439, it was determined that on an application for sale a judgment of the supreme court holding property subject to taxation prevails over former judgments of the county court holding such property exempt.

² New Orleans v. Citizens' Bank, 167 U. S. 371, followed in Baldwin v. Maryland, 179 U. S. 220. Three justices dissented in the New Orleans case, which, overlooking the Michigan decisions, erroneously speaks of the case in 38 Iowa 633 as standing alone in favor of the doctrine of non-conclusiveness, and as repudiated or qualified by 59 Iowa 226. The New Orleans case is not successful in seeking to distinguish the earlier and conflicting case of Keokuk, etc. R. Co. v. Missouri, 152 U. S. 301.

³ See Newport v. Commonwealth (Ky.), 50 S. W. Rep. 845, 51 S. W. Rep. 433; Union, etc. Bank v. Memphis, 101 Tenn. 154.

tion as to the validity of taxes binds the parties thereto in later suits involving the same taxes.¹

Judgments for taxes are not, as a rule, subject to the general statute of limitations,² or to the usual statutory exemptions.³

Enforcement by mandamus. The general rule is that *mandamus* will not lie for the collection of taxes where other adequate remedy is provided. Therefore the writ will not be issued to compel the cashier of a national bank to pay taxes against a stockholder upon his stock in the bank, and which it is the cashier's duty to pay; for the tax may be collected by distress, or by action against the bank.⁴

Enforcement by arrest. Arrest as the ordinary proceeding, and not in the course of prosecution for a penalty or forfeiture, is here referred to. By the early state law a process against the body of the person taxed was authorized as an ordinary means for the enforcement of all taxes which were a personal charge; but commonly resort to it was not allowed unless the officer on search was unable to find property.⁵ Arrest is a harsh remedy, and the statutes allowing it for the non-payment of taxes have very generally been repealed. Where it is allowed the officer must make sure of his process and follow the statute strictly, or he may become a trespasser.⁶ A

¹ Breeze v. Haley, 11 Colo. 351.

² Mercier's Succession, 42 La. An. 1135. This case holds that a judgment for city taxes is not a money judgment, and does not possess the attributes of a judgment as defined in the code of practice.

³ See Wilmington v. Sprunt, 114 N. C. 310, citing Tucker v. Tucker, 108 N. C. 235, and holding that there is no exemption from the payment of taxes.

⁴ Eyke v. Lange, 90 Mich. 592, 100 Mich. 26. See, however, McVeagh v. Chicago, 49 Ill. 318; Emory v. State, 41 Md. 38; Barney v. State, 42 Md. 480.

⁵ Lathrop v. Ide, 13 Gray 93; Hall v. Hall, 3 Allen 5. See In re Nichols,

54 N. Y. 62. A statute authorizing the collection of delinquent taxes by distress or sale does not confer the power to arrest the taxpayer's body: Marshall v. Wadsworth, 64 N. H. 386. Arrest after return-day sustained: Bassett v. Porter, 4 Cush. 487. Indictment for failing to work road: State v. Snyder, 41 Ark. 226; State v. Pool, 106 N. C. 698. Complaint for collection of poll-tax: Mason County v. Simpson, 13 Wash. 250. As to relief from arrest, see Aldrich v. Aldrich, 8 Met. 102. Enforcement of tax by proceedings for contempt. In re Prout's Estate, 3 N. Y. Supp. 831; McLean v. Erlanger, 62 Hun 1, 16 N. Y. Supp. 417.

⁶ Boardman v. Goldsmith, 48 Vt.

constitutional provision inhibiting imprisonment for debt has no application to the case of a tax,¹ nor is a property tax within the meaning of a statute exempting soldiers from arrest for any "debt or contract."²

In the case of license taxes it is still customary to provide for arrest and imprisonment as a means of enforcing payment,³ and municipalities are empowered to pass ordinances for that purpose. But general words in a city charter, not expressly conferring the power, will not be sufficient to give the authority.⁴

Distress of chattels. To authorize the collector to distrain goods and chattels for the satisfaction of a tax, the officer must have for the purpose such a warrant⁵ as is provided by law, and the law must give authority for the seizure.⁶

403. Detention of an arrested person to compel the payment of illegal fees makes the collector liable: Wilcox v. Gladwin, 50 Conn. 77.

¹ *Ante*, p. 21; Rosenbloom v. State (Neb.), 89 N. W. Rep. 1053. A statute providing for imprisonment for collection of poll-tax does not violate the fifth amendment to the federal constitution, which applies only to the federal government; nor does it violate the provisions of the Rhode Isl. and constitution that in the absence of fraud a debtor ought not to be continued in prison, and that the right of trial by jury shall remain inviolate: Poll-Tax, Collection of, 21 R. I. 582.

² Webster v. Seymour, 8 Vt. 135.

³ McCaskell v. State, 53 Ala. 511; Denver City R. Co. v. Denver, 21 Colo. 350; In re Dassler, 35 Kan. 678; Campbell v. Anthony, 40 Kan. 652; Daggett v. Everett, 19 Me. 373; Bassett v. Porter, 4 Cush. 487; Rising v. Granger, 1 Mass. 47; Appleton v. Hopkins, 5 Gray 530; St. Louis v. Sternberg, 69 Mo. 289; Bozeman v. Cadwell, 14 Mont. 480; Rosenbloom v. State (Neb.), 89 N. W. Rep. 1053; Cincinnati v. Buckingham, 10 Ohio 257; Kingman v. Glover, 3 Rich.

27; Charleston v. Oliver, 16 S. C. 47; Commonwealth v. Byrne, 20 Grat. 165. The Nebraska case overrules three previous decisions which held penal provisions of an occupation-tax ordinance to be unenforceable.

⁴ St. Louis v. Green, 7 Mo. App. 468. See St. Louis v. Sternberg, 4 Mo. App. 453. Perhaps it may be otherwise if the state collects taxes in this mode: See Slack v. Ray, 26 La. An. 674.

⁵ A personal-tax warrant was held not vitiated by the addition to the signature of the clerk of the district court the words "clerk of said county," or by the omission to affix thereto the court seal: Nelson Lumber Co. v. McKinnon, 61 Minn. 219.

⁶ A municipal corporation cannot provide for such a warrant by ordinance without statutory authority for the purpose: Bergen v. Clarkson, 6 N. J. L. 352. As to the authority to seize personal property for taxes, see San Mateo County v. Maloney, 71 Cal. 205; People v. Smith, 123 Cal. 70; Adams v. Davis, 109 Ind. 10; Covington Gas-Light Co. v. Covington, 84 Ky. 94; Fowble v. Kemp, 92 Md. 630; Michigan Lake Superior Power Co. v. Atwood, 126 Mich. 651; State v.

A distress warrant is in the nature of an execution,¹ and therefore seems at first blush a very arbitrary process, since it issues, under most of our tax laws, without any previous judicial determination of liability. But, as has already been said, this does not deprive a party aggrieved of his remedy. It only makes his remedy wait the superior urgency of government necessities. It has been well said of collection by distress: "This method of collecting taxes is as well established by custom and usage as any principle of the common law. A similar practice prevailed in all the colonies from the first dawn of their existence; it has been continued by all the states since their independence, and had existed in England from time immemorial. Indeed, it is necessary to the existence of every government, and is based upon the principle of self-preservation.² This is conclusive of the right to provide for it."

But it has sometimes been deemed necessary, after giving

Cain, 18 Neb. 631; *Spiech v. Tierney*, 56 Neb. 414; *Gage v. Dudley*, 64 N. H. 437; *Interstate B. & L. Assoc. v. Waters*, 50 S. C. 459. As to the collection of personal taxes from persons removing from one county to another in the state, see *Union Cent. L. Ins. Co. v. Chapin* (Iowa), 85 N. W. Rep. 791; *De Arman v. Williams*, 93 Mo. 158; *Richards v. Clay County Com'rs*, 40 Neb. 45. Where the statute provided that should any company neglect or refuse to pay its tax within twenty days after it became due, the auditor-general should issue his warrant for the levy and collection thereof, there was no presumption of payment from lapse of time, and neglect to issue the warrant did not destroy the lien: *Auditor-General v. Lake George & M. R. Co.*, 82 Mich. 426. A constitutional provision that taxes on movable property should be collected in the year in which the assessment was made did not prohibit collection during the year following or in a subsequent year: *Oteri v. Parker*, 42 La. An. 374. A collector with a warrant against a shareholder cannot enforce payment by

the corporation: *First Nat. Bank v. Hungate*, 62 Fed. Rep. 548; *First Nat. Bank v. Fancher*, 48 N. Y. 524. As to distress against an insolvent bank, see *ante*, p. 833. Distress will not lie against a distiller to enforce a tax upon liquor which he does not own, and as to which he is merely the agent of the state under the statute requiring him to pay the tax: *Fowble v. Kemp*, 92 Md. 630.

¹ *Virden v. Bowers*, 55 Miss. 1. It was held in *Kirkwod v. Washington County*, 32 Or. 568, that a statutory provision that a warrant for delinquent taxes shall be deemed an execution, etc., does not entitle the county to take such supplemental proceedings as are invoked after the issue of an ordinary execution.

² *State v. Allen*, 2 McCord 55. See, also, *Murray's Lessee v. Hoboken, etc. L. Co.*, 18 How. 272; *Jack v. Weien-nett*, 115 Ill. 195; *Harris v. Wood*, 6 T. B. Monr. 641, 643; *New Orleans v. Cannon*, 10 La. An. 764; *Willis v. Wetherbee*, 4 N. H. 118; *McCarrol v. Weeks*, 5 Hayw. 246; *Wrought-Iron Range Co. v. Carver*, 118 N. C. 328.

the ordinary remedy by distress, to go further. That remedy will not justify any invasion of the rights or any interference with the property of others than the very persons upon whom the tax is imposed. If the property of another is distrained, the officer may be sued in trespass, or the property may be taken from him on writ of replevin.¹ Under pretense of this right it has been found possible seriously to embarrass the officer in the performance of his duties, by means of unfounded claims, or those the officer believes to be such. To preclude this, statutes have, in some cases, been passed, taking away the ordinary remedies against the collector, and leaving the claimant to some other remedy. Some of these statutes, which merely prohibit replevin being brought against the officer, are referred to elsewhere. The New York Revised Statutes authorized the collector to seize and sell not only goods and chattels of the party taxed, but any goods and chattels in his possession, and declared that "no claim of property made by any other person shall be available to prevent a sale." This statute was enforced without question of its validity.² A similar

¹ A chattel belonging to one man cannot be taken for a tax against another, even though the latter has been owner and is still in possession: *Daniels v. Nelson*, 41 Vt. 161. Where a railroad had conveyed all of its realty and personalty, the sheriff afterwards could not seize track and road-bed by virtue of a tax-warrant from the auditor-general: *Hackley v. Mack*, 60 Mich. 591. Pretended sale to prevent levy for tax, possession being retained by vendor, officer can levy: *Gray v. Finn*, 96 Mich. 62. Sewer assessment on lots collectible by levy on personalty of owner of lots in whose name assessment was made, though he did not own lots when sewer was constructed: *Michigan L. S. P. Co. v. Atwood*, 126 Mich. 651. Partner's individual goods may be distrained for tax against firm: *Van Dyke v. Carleton*, 61 N. H. 574. A boarder in a house is not in such possession of the furniture in the room occupied by him as to authorize the

seizure of it for his taxes: *Denton v. Carroll*, 4 App. Div. (N. Y.) 532, 40 N. Y. Supp. 19. A transfer of property subject to taxation by persons individually to themselves, as constituting a corporation, does not constitute the corporation an innocent purchaser so as to defeat a claim for taxes thereon: *Bloxham v. Florida Cent. & P. R. Co.*, 35 Fla. 695. As to the liability of a railroad company formed by the consolidation of two companies, to pay the tax on the defunct roads, see *Bailey v. Railroad Co.*, 22 Wall. 604. See, also, as to liability of consolidated company, *Bloxham v. Florida Cent. & P. R. Co.*, *supra*.

² *Sheldon v. Van Buskirk*, 2 N. Y. 473. This legislation was fully sustained in *Hersee v. Porter*, 100 N. Y. 403, where it was held that a distraint on mortgaged chattels left in the mortgager's possession, and used by him the same as before, was authorized. A statute declaring that

statute in Michigan was strongly contested as not being due process of law, and was upheld by a divided court.¹ In New Jersey a tax-collector may be authorized to seize on a tax-warrant the tenant's goods for a tax assessed against the landlord in respect of the leased premises.² In Pennsylvania a statute has been enforced which empowered the collector to distrain the property of an occupier of land wherever found, for the satisfaction of a tax assessed in respect to the land against the owner.³

What property shall be subject to distress the statute itself will determine; and it may or may not be the same which is subject to execution on judgments.⁴ If the distress for any reason is returned to the owner, without being in any manner appropriated to the discharge of the tax, the tax is not paid, and may be distrained for a second time.⁵

It is very proper that a demand for the tax should be made a prerequisite to the levy by distress;⁶ and it is not often that

goods and chattels on lands assessed shall be deemed to belong to him to whom it is assessed does not apply to property transiently there for the owner's purposes, viz., a railroad company's engine and cars: *Lake Shore, etc. R. Co. v. Roach*, 80 N. Y. 339. Question of fact whether goods were in possession of person who should have paid tax: *Coie v. Care*, 82 Hun 360.

¹ *Sears v. Cottrell*, 5 Mich. 251.

² *Morrow v. Dows*, 28 N. J. Eq. 459.

³ *McGregor v. Montgomery*, 4 Pa. St. 237. See *Wright v. Wigton*, 84 Pa. St. 163.

⁴ See *Witters v. Sowles*, 32 Fed. Rep. 130; *Solomon v. Willis*, 89 Ala. 596; *Kennedy v. Mary Lee Coal & R. Co.*, 93 Ala. 494; *Blain v. Irby*, 25 Kan. 499; *Atchison, T. & S. F. R. Co. v. Peterson*, 58 Kan. 818, 51 Pac. Rep. 290; *Covington Gas-Light Co. v. Covington*, 84 Ky. 94; *Oteri v. Parker*, 42 La. An. 374; *Rivers v. New Orleans*, 42 La. An. 1196; *American Casualty Ins. Co.'s Case*, 82 Md. 535; *Hull v. Southern Development Co.*, 89 Md. 8;

Chicago & N. W. R. Co. v. Ellson, 113 Mich. 30; *Russell v. Green (Okl.)*, 62 Pac. Rep. 817; *Mullins v. New Jersey*, 61 N. J. L. 135; *Chicago & N. W. R. Co. v. Forest County*, 95 Wis. 80. As to sufficiency of distress or levy in case of bulky personalty, see *St. Anthony & D. E. Co. v. Bottineau County*, 9 N. D. 346; *New Richmond Lumber Co. v. Rogers*, 68 Wis. 608. As to collection by distress of a school-tax when by a division of a school district after a tax is levied the property liable is found to be in the new district, see *McKay v. Batchellor*, 2 Colo. 591.

⁵ *Farnsworth Co. v. Rand*, 65 Me. 19. Where personalty sufficient to pay the taxes on land was levied upon, but was lost solely through the sheriff's negligence, the taxes were paid, and the land could not be sold therefor: *Campbell v. Wyant*, 26 W. Va. 702. That a levy on personalty is *prima facie* a satisfaction of a tax, see *Henry v. Gregory*, 29 Mich. 68.

⁶ See *Hoozer v. Buckner*, 11 B.

statutes are passed which are so little regardful of the citizen's rights as to authorize distress without at least a call upon the persons taxed and an opportunity to pay without the expense and annoyance of a levy.¹ A statutory requirement of demand or personal notification is imperative, and distress without it would be it illegal.² Where, however, the collector is required

Monr. 183; *McLean v. New York & S. B. Ferry, etc. Co.*, 60 Hun 80. Unless the statute requires it demand is not essential before distraint: *Ives v. Lyman*, 7 Conn. 504. Where demand is a step in the establishment of a lien it cannot be dispensed with, and it should be for the specific amount to be paid: *United States v. Pacific R. Co.*, 4 Dill. 71. As to the necessity for strict compliance with the statute, see *Midland R. Co. v. State*, 11 Ind. App. 433; *Villey v. Jarreau*, 33 La. An. 291; *Missouri v. Spiva*, 42 Fed. Rep. 435. It was held in *Andrews v. Sellers*, 11 Ind. App. 301, that property distrained for taxes could not be replevied because the town officers, before making the seizure, failed to demand payment of the taxes. Where an officer is required to demand the payment of taxes before levying a distress warrant for the same, it is presumed, after he has made the levy, that before he did so he made such demand: *Nelson Lumber Co. v. McKinnon*, 61 Minn. 219. See, as to the sufficiency of a demand, *Himmelman v. Townsend*, 49 Cal. 150; *Himmelman v. Booth*, 53 Cal. 50. A demand at the last and usual place of abode of a non-resident in the town, if he has no agent there, is sufficient to justify a subsequent seizure and sale of his goods under a statute requiring that "the collector shall, before distraining the goods of any person for his tax, demand payment thereof of such person, if to be found within his precinct:" *King v. Whitcomb*, 1 Met. 328.

¹ It was held in *Nelson Lumber Co. v. McKinnon*, 61 Minn. 219, that a statute providing for the issue of distress warrants for the collection of personalty taxes without prior notice is constitutional, and not open to the objection that it is not due process of law.

² *Cones v. Wilson*, 14 Ind. 465, 466. The collector's authority must be pursued strictly: *Bishop v. Lovan*, 4 B. Monr. 116. Where the sheriff was to distrain for taxes, if, on presenting an account of the taxes and offering a receipt, they were not paid, a distress without these was illegal: *Hoozer v. Buckner*, 11 B. Monr. 183, 184. See, to the same point, *Bopnell v. Roane*, 20 Ark. 114; *Ives v. Lynn*, 7 Conn. 504; *Thompson v. Rogers*, 4 La. 9; *Moulton v. Blaisdell*, 24 Me. 283; *Harrington v. Worcester*, 6 Allen 576; *St. Anthony, etc. Co. v. Greely*, 11 Minn. 325; *Johnson v. McIntyre*, 1 Bibb 295; *Atkinson v. Amick*, 25 Mo. 404; *Burd v. Ramsey*, 9 S. & R. 109. Under the Kentucky statute tender of a receipt to a non-resident was held unnecessary: *Smith v. Ryan*, 88 Ky. 636. Where the law required supervisors, before issuing duplicate and warrant for the collection of road taxes, to give notice to all persons rated for such taxes, by advertisement or otherwise, to attend at such times and places as such supervisors may direct, so as to give such persons full opportunity to work out their respective taxes, held to be mandatory and a condition precedent: *Miller v. Gorham*, 38 Pa. St. 309. So,

to appoint a time and place to receive payment, if the taxpayer when called upon expresses a purpose not to pay at all, the collector need not name time and place for the purpose, but may levy at once.¹ A premature levy by a collector without sufficient cause renders him liable in trespass.²

It has been held that a statute limiting the time within which civil actions may be brought, does not apply to proceedings to collect delinquent taxes by distress.³

Unless authorized by statute a tax-collector has no right to restore to the owner property seized for a tax, on receiving from him a bond conditioned, for the return of such property to the officer if the tax is determined judicially to be valid. Such a bond, it has been held, would be void.⁴

Lien upon chattels. Property seized for taxes will be taken subject to any prior lien⁵ existing in favor of individuals;⁶ and it therefore becomes important to know at what time the lien

failure to give the notice and afford the opportunity accorded by the statute to make payment of a highway-tax in labor vitiates the levy: *Chicago & N. W. R. Co. v. People*, 171 Ill. 525. See *Sumner v. Gardiner*, 88 Me. 584. Where a city charter provides for thirty days' publication of a notice to pay taxes, but allows other legal notice, a publication for one day, coupled with due public posting, has been held sufficient: *Brunswick v. Finney*, 54 Ga. 317.

¹ *Downer v. Woodbury*, 19 Vt. 329; *Wheelock v. Archer*, 26 Vt. 380; *Hurlbut v. Green*, 42 Vt. 316.

² *Veit v. Graff*, 37 Ind. 253.

³ *Iowa Land Co. v. Douglas County*, 8 S. D. 429; *Price v. Lancaster County*, 18 Neb. 199. It was held in *State v. Plainfield*, 46 N. J. L. 119, that a property-owner does not escape liability for taxes because the collector fails to pursue the legal methods within the prescribed time; there is in New Jersey no statute of limitations applying to the collection of taxes; and where no legal return has been made, the legisla-

ture may extend the time within which the old remedy may be enforced, or provide new methods for collecting the tax.

⁴ *Hardesty v. Price*, 3 Colo. 556. See, for the same principle, *Morgan v. Hale*, 12 W. Va. 713; *McWilliams v. Phillips*, 51 Miss. 196. The case of *Pay v. Shanks*, 56 Ind. 554, seems opposed to the Colorado case above cited. Construction of statutory bond to pay taxes given in order to release personalty: *Curry v. Gila County (Ariz.)*, 53 Pac. Rep. 4. A set-off of the sheriff's individual debt cannot be allowed against a forthcoming bond given on levy for taxes: *Miller v. Wisener*, 45 W. Va. 59.

⁵ A lien is said to be a qualified right which, in a given case, may be exercised over another's property: *Degner v. Brown*, 74 Md. 144.

⁶ A sale of mortgaged chattels to satisfy general taxes due from the mortgager has been held not to pass to the purchaser title free from the lien of the mortgage: *Woody v. Jones*, 113 N. C. 253. An attachment is not displaced by the lien which

for taxes will attach. This will depend on whether the statute directly or by implication prescribes a rule for the case.¹ If it does not, the lien will attach from the time the goods were

the Illinois statute fixes subsequently upon all the personalty of the tax-debtor: *Gaar v. Hurd*, 92 Ill. 315. And in New York a specific lien upon personalty acquired by an attachment does not yield to a subsequent claim for taxes on the same property where no specific lien has been acquired for such claim by warrant or other process: *Wise v. Wise Co.*, 153 N. Y. 507. The claim of the state for taxes is said in *Hewitt v. Traders' Bank*, 18 Wash, 326, to be superior to all other claims and liens against the property. In *Minnesota v. Central Trust R. Co.*, 94 Fed. Rep. 244, 36 C. C. A. 214, the lien created by statute for taxes upon personalty is held paramount to any other lien, prior or subsequent, in favor of private persons. In Montana, property in a retail liquor dealer's possession is subject to the prior lien of a license tax, though there was a duly recorded chattel mortgage thereon: *Burfiend v. Hamilton*, 20 Mont. 343. In Georgia, if property is in the custody of the law, the state's lien for taxes overrides all others except the judicial costs: *Georgia v. Atlantic, etc. R. Co.*, 3 Woods 424. In Illinois property assigned for the benefit of creditors may be taken for the payment of taxes levied before the assignment, although such taxes had not then become a lien on the assigned property: *Jack v. Weienett*, 115 Ill. 105. See *Dunlap v. Gallatin County*, 15 Ill. 7. In Iowa taxes assessed against goods which pass to an assignee for creditors are by statute entitled to priority without any demand or levy, and the assignee must at his peril provide for and pay them: *Huiscamp v. Albert*, 60 Iowa 421. And where a tax is assessed on

personalty in the hands of an assignee for creditors, the assignee must pay them as between himself and a mortgagee of the assigned realty, although by statute such taxes are a lien on realty: *Brooks v. Eighmey*, 53 Iowa 276. It was, however, held in *Howard County v. Strother*, 70 Iowa 593, that the statute providing that claims for taxes should be entitled to preference in all assignments for creditors does not apply where there is simply a contest between lien-holders whose claims will exhaust the fund; there being no lien for the tax. In Michigan goods assigned for the benefit of creditors after taxes are assessed cannot be seized in the assignee's hands for the tax unless there is a lien by statute: *Lyon v. Guthard*, 52 Mich. 271. In Maryland taxes of a corporation which becomes insolvent after they are due are a prior lien on its assets, and on a special fund for the payment of losses after the other assets are exhausted: *American Casualty Ins. Co.'s Case*, 82 Md. 535. In Ohio taxes are preferred over a mortgage in the distribution of assigned personalty: *Adair v. Blackburn*, 60 Ohio St. 575. As to the prior claims of a city in Wisconsin for unpaid taxes assessed on property assigned for creditors' benefit — taxes to be paid before dividends — see *Riddle's Assignment*, 93 Wis. 564.

¹ In Illinois the lien on personalty attaches when, and not before, the tax-books are placed in the collector's hands: *Gaar v. Hurd*, 92 Ill. 315; *Binkert v. Wabash R. Co.*, 98 Ill. 205; *Ream v. Stone*, 102 Ill. 359; *Cooper v. Corbin*, 105 Ill. 224. And then it is not a lien on specific property, but upon all the owner's personalty sub-

distrained; not from the date of assessment, or even of the delivery of the tax-warrant to the officer.¹ And the lien will

ject to all prior valid existing liens: *Cooper v. Corbin*, 105 Ill. 224. In Indiana there seems to be a lien for taxes on personalty from the time when the duplicate comes to the collector's hands: *Barker v. Morton*, 19 Ind. 146. In Iowa, where a tax had been levied on a stock of merchandise, the lien thereon, under a statute subsequently enacted, which statute did not fix a specific time when the tax should become a lien, attached on the day when the statute went into effect: *Plymouth County v. Moore* (Iowa), 87 N. W. Rep. 662. In Michigan the statute provides that "all personal taxes shall . . . be a lien on all personal property" of the person assessed, from and after the first of December in each year, a purchaser or mortgagee of personalty prior to that day takes it free from any lien for taxes: *Tousey v. Post*, 91 Mich. 631; *St. Johns Nat. Bank v. Bingham T'p*, 113 Mich. 203. In Missouri a lien for city taxes does not attach until the tax is levied and extended by the city council on its tax-book: *Westport v. McGie*, 128 Mo. 552. In Nebraska taxes assessed on personalty are a lien upon all the tax-debtor's personalty from the time when the tax-list is delivered to the county treasurer, and such lien is superior to that of a subsequent chattel mortgage: *Reynolds v. Fisher*, 43 Neb. 172; *Farmers' L. & T. Co. v. Memminger*, 48 Neb. 17; *Blanchard v. Logan County* (Neb.), 89 N. W. Rep. 376. So, also, it is superior to the lien of a subsequent attachment: *Reynolds v. McMillin*, 43 Neb. 183. In New Jersey a tax-lien begins when the tax-duplicate is completed and delivered to the collector, under a statute making the tax a lien "from and after the date of levy and assessment:" *Hohenstatt v. Bridgeton*, 62

N. J. L. 169. In North Dakota a lien for taxes on personalty does not arise until after the tax has been assessed and levied, and the tax-books received by the county treasurer: *Swenson v. Greenland*, 4 N. D. 532. Under the Pennsylvania statute requiring the city treasurer to certify at a certain time schedules of unpaid taxes to the city treasurer to be registered by him as liens, certification by the treasurer is essential to such registration: *Reading v. Krause's Estate*, 167 Pa. St. 23. The Washington statute providing that taxes assessed on personalty shall be a lien thereon though possession has been transferred after a specified day next succeeding the levy, applies also where title, as well as possession, has been transferred; *Mills v. Thurston County*, 16 Wash. 378. And the lien cannot be avoided on the ground that some of the goods have been sold and other goods added since the levy, rendering it impossible to segregate the part actually assessed: *Ibid.* But personalty transferred before the day specified is not subject to a lien for taxes: *Phelan v. Smith*, 22 Wash. 397.

¹ See *Tompkins v. Railroad Co.*, 18 Fed. Rep. 344; *McKay v. Bachellor*, 2 Colo. 591; *Palmer v. Pettingill* (Idaho), 55 Pac. Rep. 653; *Shelby v. Tiddy*, 118 N. C. 792; *Moore v. Marsh*, 60 Pa. St. 46. In Delaware it is held that in the absence of statute no lien exists on personalty for realty taxes, unless by some execution process; and the primary liability of personalty does not change the rule: *In re Lord, etc. Chem. Co.*, 7 Del. Ch. 248. In Iowa a mortgagee of goods who took possession before they had been seized for taxes, and who sold them for the satisfaction of his demand,

not be divested by failure to make the tax a lien on lands,¹ or by the subsequent issue of execution,² or by the appointment of a receiver of the property,³ although, being merely to secure the public, it may be vacated by a bond given on appeal from a judgment for the tax.⁴ Nor will the fact that judgment is taken for the amount of a tax-lien defeat the tax.⁵

Sale of chattels. The right to sell property to enforce the payment of a tax depends upon the legal liability of the owner to pay the tax, and a legal default in making payment.⁶ A constitutional provision that personalty to a certain value shall be exempt from sale under execution does not include an exemption from sale for taxes.⁷ It has been held that statutory provisions relating only to taxes levied on real estate, and providing that for taxes due in certain years property shall not be sold before a specified date, cannot be extended to personal property.⁸ Statutes regarding notice, and limiting the time within which a sale of distrained property shall be made, are imperative, and the officer becomes a trespasser *ab initio* if he proceeds to a sale without them.⁹ In short, in those cases in which property is to be sold for taxes without judicial process,

either in person or through a receiver appointed by a court, was held entitled to the proceeds as against the tax-collector: *Marsh v. Bird*, 22 Fed. Rep. 180. Where a tax assessed on personalty is not a lien thereon, if the owner subsequently sells the property it cannot be subjected to payment of the tax: *Jaffray v. Anderson*, 66 Iowa 718.

¹ *Duryee v. United States Credit-System Co.*, 55 N. J. Eq. 311.

² *Evans v. Bradford*, 35 Ind. 527; *McNeil v. Freeman*, 37 Ind. 203.

³ *Union Trust Co. v. Weber*, 96 Ill. 346.

⁴ *People v. Preston*, 1 Idaho 374.

⁵ *Boyce v. Stevens*, 86 Mich. 549.

⁶ *Green v. Craft*, 28 Miss. 70. Under the California code the purchaser at a tax-sale of personalty assessed to one who had the possession and control thereof, gets a good title: *Houser, etc. Manuf. Co. v. Hargrove*,

129 Cal. 90. See *Smith v. Northampton Bank*, 4 Cush. 1.

⁷ *Wilmington v. Sprunt*, 114 N. C. 310.

⁸ *Percival v. Thurston County*, 14 Wash. 586.

⁹ As to the requisites of the notice of sale, see *Scott v. Watkins*, 22 Ark. 556; *Lyle v. Jacques*, 101 Ill. 644; *Barnard v. Graves*, 13 Met. 85; *Rawson v. Spencer*, 113 Mass. 40. Where the statute required property seized for taxes to be sold within four days, keeping it longer made the officer a trespasser *ab initio*: *Brackett v. Vining*, 49 Me. 356. Sale made after the time thus limited held void: *Pierce v. Benjamin*, 14 Pick. 356; *Noyes v. Haverhill*, 11 Cush. 338; *Lefavour v. Bartlett*, 42 N. H. 555. Statutory provisions requiring the collector to keep a distress four days before advertising, and to advertise six days, do not restrict him to this

it is indispensable that all the proceedings — except such as may be mere formalities of no importance to the taxpayer — comply strictly with the law.¹

A purchaser's title cannot be defeated by any neglect of duty by the tax-collector after the sale.² It has been held that a statute passing the state's lien to a purchaser of land at an invalid tax-sale does not apply to an invalid sale of personalty, and that the purchaser at such sale acquires no lien entitling him to possession.³ If mortgaged personalty is sold for taxes, and mortgager and mortgagee claim the surplus, the collector is liable to the mortgagee for the amount paid by him to the mortgager.⁴

Where a statute covers the entire subject of taxation, includ-

exact time, though he may not sell in less: *Clemons v. Lewis*, 36 Vt. 673. See *Harriman v. School Dist.*, 35 Vt. 311. An adjournment of the day of sale can be made by the officer in his discretion; and the fact that in making the adjournment he inserted "Four o'clock, A. M.," instead of "Four o'clock, P. M.," being an obvious mistake deceiving no one, the alteration of it, on the morning of the day of sale, would not mislead any one as to the true time of sale intended in the original adjournment. In any event it would not render the officer a trespasser *ab initio*: *Wheelock v. Archer*, 26 Vt. 380. But a sale for taxes at ten in the morning, when the sale had been adjourned to one in the afternoon, is void, and makes the officer a trespasser: *Buzzell v. Johnson*, 54 Vt. 90. In Maine the property seized need not be sold in the same town if proper reasons exist for removing it into another: *Carville v. Additon*, 62 Me. 459.

¹ *Ward v. Carson, etc. Co.*, 13 Nev. 44; *Emerson v. Thompson*, 59 Wis. 619. Where the tax-collector sold in one lot a horse and several watches without affording sufficient opportunity for examination of the watches or for competitive bidding, the sale

vested in the purchaser no title by which he could defend an action for conversion: *Shimer v. Mosher*, 39 Hun 153. In *Taylor v. Robertson*, 16 Utah 330, a sale from a flock of 5,000 sheep of enough sheep to pay a tax of \$97, leaving the selection to the buyer after sale, was held void. So, in *Leaton v. Murphy*, 78 Mich. 77, was a sale of two horses, either of which was worth more than the amount of the tax; the horses not being a matched team, and it not appearing that it was for the interest of the parties to sell them together. If the collector, after selling enough to pay the tax and expense of sale, sells other property distrained, he will be a purchaser *ab initio* only in respect to the articles sold, in excess of the necessity: *Seekins v. Goodale*, 61 Me. 400, explaining *Williamson v. Dow*, 32 Me. 559. It was held in *Keystone Lumber Co. v. Pederson*, 93 Wis. 466, that a town-treasurer who had levied upon personalty under a tax-warrant valid on its face for a tax appearing on his roll against the owner thereof, could complete the proceedings although his distress warrant expired before the sale.

² *Gerry v. Herrick*, 87 Me. 219.

³ *Boutwell v. Parker*, 124 Ala. 341.

⁴ *McDuffie v. Collins*, 117 Ala. 487.

ing redemption, and repeals earlier acts, but makes no provision for redemption in case of sale of personal property, the provisions of earlier acts permitting such redemption are no longer in force.¹

Detention of goods and chattels. Reference is made here not to the proceedings in which goods are distrained or seized for forfeitures or penalties, but to those under which goods, in respect to which the tax is demanded, are required to pass through the hands of government officers, who are to exact the tax before the owner or consignee is entitled to their custody. Cases of this nature arise under the laws for the collection of customs duties, but do not require special mention, being fully provided for by the federal statutes.²

Forfeiture of property taxed. It is provided by law in some states that if the taxes assessed against lands shall not be paid by a certain time, and after some prescribed notice, the land shall be forfeited to the state.³ The Virginia statute of 1790 may be taken as an illustration. After making provision for the taxation of lands; that the sheriff should make to the auditor of public accounts a return, under oath, of all those the taxes upon which he could find no effects for the satisfaction of,—that certain prescribed steps should be taken for collection the following year, and, if these failed, there should be published in the Virginia Gazette, for three weeks, the names of delinquents, the quantity of land, the situation thereof and the taxes due thereon, it then proceeded to declare that in case the tax on any part of the lands should not be paid for the space of three years “the right to such lands shall be lost, forfeited, and vested in the commonwealth,” etc. This was a more liberal statute, in the time it allowed for payment, than those usually are which provide for such a forfeiture, but the general characteristics of all are alike.

Serious question has been made of the right of the government to take to itself title to lands, under a forfeiture based

¹ Hadley v. Musselman, 104 Ind. 459. paying the tax thereon: United

² The destruction by an officer's fault of goods in bond does not release the owner from the duty of States v. Farrell, 8 Biss. 259.

³ Proof of notice to be followed by forfeiture must be strictly made: Tolman v. Hobbs, 68 Me. 316.

on a personal default, without a judicial finding that such a default exists. The question was made in the early cases arising under these statutes, and has continued to be made ever since, without having yet reached conclusive settlement. One of the most learned and able of the early Virginia judges declared his opinion, under the act of 1790, that the forfeiture could not be perfected so as to divest the title of the former owner without inquest of office.¹ This view was accepted in Kentucky,² and has been assented to in an elaborate opinion by the supreme court of Mississippi, though this was weakened by able dissent.³ Decisions in Minnesota are to the same effect.⁴ But there are respectable authorities to the contrary,⁵ among which are now to be reckoned those of Virginia⁶ and West Virginia.⁷

¹ *Tucker, J.*, in *Kinney v. Beverly*, 2 H. & M. 318. The other judges gave no opinion on this point.

² *Barbour v. Nelson*, 1 Litt. 60; *Robinson v. Huff*, 3 Litt. 38. And see *Currie v. Fowler*, 5 J. J. Marsh. 145; *Harlan's Heirs v. Seaton's Heirs*, 18 B. Monr. 312. In *Marshall v. McDaniel*, 12 Bush 373, it is said that although the statute may require the listing of property for taxation, and as a penalty for failure to list may impose a forfeiture, the forfeiture must be declared by due process of law. The failure to list cannot *ipso facto*, without inquiry or trial, or chance for the defaulting party to be heard, vest title to the land in the state.

³ *Griffin v. Nixon*, 38 Miss. 424. The Missouri statute (1865) did not vest in the state the absolute title to lands which for want of bidders were struck off to the state, but only gave a lien for the taxes: *State v. Heman*, 7 Mo. App. 584, 70 Mo. 441. Laws for the forfeiture of lands for non-payment of taxes are to be strictly construed as between the owner and a purchaser from the state: *Tolman v. Hobbs*, 68 Me. 316. If land is imperfectly described in the assessment

roll it cannot be forfeited for default in payment: *Re Baton Rouge Water Works*, 34 La. An. 255. It was held in *Scharf v. Tasker*, 73 Md. 378, that the provision of the Maryland Declaration of Rights against taking property without due process of law was violated by a statute to the effect that owners of unassessed military lots should forfeit all their rights to the state unless they established their title within a designated time.

⁴ See *St. Anthony, etc. Co. v. Greely*, 11 Minn. 321; *Baker v. Kelly*, 11 Minn. 480; *Hill v. Lund*, 13 Minn. 451.

⁵ *Hodgdon v. Wight*, 36 Me. 326; *Adams v. Larrabee*, 46 Me. 516, 519.

⁶ *Wild's Lessee v. Serpell*, 10 Grat. 405; *Hale v. Branscum*, 10 Grat. 418; *Flanagan v. Grimmet*, 10 Grat. 421; *Usher v. Pride*, 15 Grat. 190. Whether a state can lawfully provide that the absolute title to lands shall be divested merely by the owner's failure, during a named period, to list them for taxation — without an inquisition or some proceeding declaring the forfeiture — *quære*; the answering of the point not being necessary to a decision of the case: *King v. Mullins*, 171 U. S. 404.

⁷ *State v. Cheney*, 45 W. Va. 478;

Some ground we may safely occupy here without liability to controversy. It is conceded on all sides that an intent to transfer title to the government by forfeiture will not be inferred in any case from language capable of any milder construction.¹ The courts of Ohio acted upon this view when they held that a statute which declared that, after due record of the default, the land "shall be considered as forfeited to the state of Ohio, and be subject to be disposed of in such manner as any future legislature may direct," did not work an absolute forfeiture, and the owner might redeem afterwards. But this was partly, at least, on the ground that the legislature had never treated this forfeiture as vesting a title in the state for any other purpose than as security for taxes

State v. Swann, 46 W. Va. 128; State v. Tavenner (W. Va.), 39 S. E. Rep. 649. Where a tract of land had been omitted from the commissioner's books, and had thus become forfeited to the state under the act of 1835, entry of it on such books in the year 1866 did not relieve it from the forfeiture: Yokum v. Fickey, 37 W. Va. 762. The constitutional provision for the forfeiture of lands containing one thousand acres or more does not, by implication, limit forfeiture to tracts of one thousand acres or more: State v. Swann, *supra*. Where a tract of land lies in two counties, entry in either saves it from forfeiture for non-entry: State v. Cheney, *supra*. Under the West Virginia statute of 1869 the omission of lands from the commissioner's books for only two years, or for any time less than five years, and the failure afterwards to charge up the back taxes, do not work a forfeiture: Lashier v. McCreery, 66 Fed. Rep. 834. If a patent for a tract of a given number of acres is entered for taxes accordingly, the fact that it contains a larger quantity will not forfeit the excess for non-entry: State v. Cheney, 45 W. Va. 478. Where lands have been purchased by the state at a tax-sale

they cannot under the West Virginia statute be forfeited for non-entry: Sayers v. Burkhardt, 85 Fed. Rep. 246, 29 C. C. A. 137. As to the state's right to set up forfeiture for non-entry where land has been sold for taxes, see State v. Sponaule, 45 W. Va. 415. A proceeding brought by the commissioner of school lands in 1882 to forfeit a tract of land in the name of the original owner, who had in fact conveyed it to others in 1797, since when there had been various conveyances and one sale for non-payment of taxes, is *coram non judice* and void: Ibid. If a grantor who has conveyed the gas and oil in a tract of land keeps the taxes paid on the land remaining charged as a whole to him at full valuation, there can be no forfeiture of the gas and oil interest for non-entry for five years in the grantee's name: State v. Law, 46 W. Va. 451. Further as to forfeiture, see Braxton v. Rich, 47 Fed. Rep. 178; McClure v. Maitland, 24 W. Va. 561; Holly River Coal Co. v. Howell, 36 W. Va. 489.

¹Fairfax's Devisee v. Hunter's Lessee, 7 Cranch 603, 605; Schenck v. Peay, 1 Dillon 267; Bennett v. Hunter, 18 Grat. 100, 9 Wall. 326, 336; Dickerson v. Acosta, 15 Fla. 614.

due and owing.¹ That statutes of forfeiture are strictly construed is an elementary principle,² and there are no cases in which the rule requiring a substantial compliance with all the important provisions of the statute will more rigidly be insisted upon.³

Where the power of legislation *ipso facto* to work a forfeit-

¹ *Theremin v. Slocum's Lessee*, 16 Ohio 519, 532. This case is cited and relied upon in *St. Anthony, etc. Co. v. Greely*, 11 Minn. 321. See, also, *Woodward v. Sloan*, 27 Ohio St. 592. Where lands are to be forfeited to the state on non-payment of the tax and a record of the forfeiture made, a sale of the land as forfeited, when there is no such record, is bad: *Magruder v. Esmay*, 31 Ohio St. 222.

² See *Schenck v. Peay*, 1 Dill. 267; *Lohrs v. Miller's Lessee*, 12 Grat. 452; *Twiggs v. Chevallie*, 4 W. Va. 463; *Scott v. People*, 2 Ill. App. 642; *Smith v. People*, 3 Ill. App. 380; *Chicago, etc. R. Co. v. Boller*, 7 Ill. App. 625. A subsequent taxing of lands by the state, and the receipt of taxes from the former owner, was held in *Hodgdon v. Wight*, 36 Me. 326, to be no waiver of the forfeiture. The same decision was made in *Crane v. Reeder*, 25 Mich. 303, which was a case of escheat. In that case *Campbell, J.*, discusses at length the question of necessity of inquest of office, and concludes that it is not necessary. If, under the statute, the title to land condemned relates back to the commencement of proceedings, taxes laid thereon pending the condemnation do not become a charge upon the former owner: *Sherwin v. Wigglesworth*, 129 Mass. 64. In Illinois, real property is forfeited to the state, within the meaning of the tax law, when "at any regular tax sale, under the revenue act, the collector shall offer the property for sale, and it shall not have been sold for want of bidders." Then it is the duty of the clerk to add to the tax for the

current year on such property the back taxes, interest, and penalties. Thereafter it becomes unimportant whether a judgment for taxes for prior year is in strict conformity to statute. The land is subject to the penalties, interest, and costs, whether the forfeiture was in due form or not. Nor by paying the current taxes of a year, after forfeiture, can the owner avoid paying the taxes, interest, and penalties already added thereto for former years: *Biggins v. People*, 106 Ill. 270. See, further, *People v. Gale*, 93 Ill. 127; *People v. Smith*, 94 Ill. 226; *Belleville Nail Co. v. People*, 98 Ill. 399. In South Carolina, the state must prove its title by forfeiture if it relies upon it. *State v. Thompson*, 18 S. C. 538. In Louisiana, a purchaser after forfeiture from the original owner acquires his right to redeem, but not a right to enjoin a sale by the state. *Geren v. Gruber*, 26 La. An. 694; *Morrison v. Larkin*, 26 La. An. 699; *Garner v. Anderson*, 27 La. An. 338. As to what is meant by forfeiture in that state, and the constitutional right to declare it, see *Morrison v. Larkin*, 26 La. An. 699. Where owners of property permit it to be forfeited and vested in the state they have no interest in the future disposition of it by the state: *Surget v. Newman*, 43 La. An. 873.

³ See *Hopkins v. Sandige*, 31 Miss. 668, 676, in which the delay of a few days after the time fixed by statute for the return of the list was held to defeat the forfeiture. See, also, *Kinney v. Beverly*, 2 H. & M. 318, 331; *Dentler v. State*, 4 Blackf. 258; *Williams v. State*, 6 Blackf. 36.

ure is in question, it is important that there be a clear and precise understanding of what is intended in the use of this word "forfeiture." The usual method of enforcing the payment of taxes upon property is by putting the property up at a public sale. No one questions the right to do this, and no one doubts that the sale, if fair and made in compliance with the law, and after all the necessary preliminary steps have been taken, vests a perfect title in the purchaser to the full extent that the statute shall declare. No judicial proceedings are required to perfect the title, and if the purchaser have need of a resort to them, in order to obtain possession, it is only what might occur to any owner of property under any undisputed title. In what important particular does this differ from the case of forfeitures, except that to the proceedings which are to work the forfeiture there is added the one requirement of a public sale? But there are in the sale no elements of an adjudication; it does not stand in the place of one; its purpose is only to bring to the public treasury the tax for which the sale is made. Incidentally in the proceedings a purpose is kept in view, not to sacrifice any farther than shall be necessary the interests of the owner; and to this end notice of the sale is required, with a view to invite competition among bidders. But we are not aware of any constitutional principle that entitles a party to have his duty coerced by a public sale of property, rather than by a forfeiture of it. A sale by a ministerial officer which, as the closing step in administrative action, is to divest the owner of his title, is as much obnoxious to the charge that it deprives him of his freehold without a hearing, as is the legislative forfeiture. Whatever there is of the nature of judicial inquiry lies back of these proceedings in the action of the assessing officers, and, as has already been stated, is the same in both cases. If the owner is condemned without a hearing in the one case, he is in the other.

It may be that a public sale would be most advantageous to the person taxed, because it might leave to him some portion of his property after the tax was satisfied. In the vast majority of cases, however, the sale is of the whole land, and the possible benefit is not had. But there is no imperative principle of government which requires the legislature, in prescribing

rules of administration, to fix upon those which would be most for the advantage of a negligent or defaulting citizen. We suppose, on the other hand, that the legislature has very ample discretion to determine the rule on its own view of public policy. If it deems a sale more advantageous to the state than a forfeiture, it will provide for it; otherwise not.

But if by forfeiture is understood the vesting in the state a title which shall be absolute and beyond dispute, the question presented is different. It is impossible that there can be any right to declare such a forfeiture, except as the result of an adjudication to which the owner was a party, which has determined that the default, upon which the forfeiture was based, exists in fact, and that the requisite steps which were to precede the forfeiture have actually been taken. In some judicial tribunal the party whose freehold is seized has a right to a hearing on these questions: a constitutional right, if constitutional protections to property are of any avail. But if by forfeiture is understood only that without sale there shall pass to the state such title as a purchaser would acquire if a sale were to take place, the declaration of forfeiture can, of itself, work no absolute deprivation of right. If the default existed and the tax proceedings are regular, the state has the title; if not, it remains in the person taxed. And, in the absence of any statute changing the burden of proof, it would devolve on the state to prove the regularity of the proceedings, precisely as it would on the purchaser when demanding the land under the deed given on a purchase.¹

¹ See *Kinney v. Beverly*, 2 H. & M. 318, 331; *Hopkins v. Sandige*, 31 Miss. 668, 676. See, also, *post*, ch. XVII. The proceedings for forfeiture, where a judicial prosecution is required, it seems unnecessary to consider. An intent to defraud is made a ground of forfeiture under some of the federal revenue laws. See *United States v. Hogsheads of Tobacco*, 2 Bond 137; *United States v. Caddies of Tobacco*, 2 Bond 305; *Henderson's Spirits*, 14 Wall. 44. The statute imposing the penalty of forfeiture of land and buildings employed in violation of a revenue law, sustained as constitutional: *United States v. McKinley*, 4 Brewster 246. See *United States v. Spreckens*, 1 Sawy. 84; *Quantity of Tobacco*, 5 Ben. 407. That there must be full showing of the facts upon which the right of forfeiture depends, see *State v. Thompson*, 18 S. C. 538. Under the Louisiana statutes property is forfeited to the state for non-payment of taxes from the filing of the delinquent rolls; and the forfeiture can be set aside only on proof of payment: *Surget v. Newman*, 43 La. An. 873.

Levy upon land. At the common-law distress applied to the seizure of personal chattels only;¹ but the power to distrain may be extended to realty,² and it has been so extended in some of the states.³ In Georgia, where resort to this remedy for collecting taxes is permitted,⁴ a tax-collector cannot issue an execution against land whereof the owner was in possession at the time when it became the officer's duty, because of the owner's having made default in returning the land, to make a return for him;⁵ nor, formerly, could he issue such process against the wild lands of a non-resident.⁶ In order to make a legal levy upon land it is not necessary, under the Georgia code, that the constable make an entry or return of no personalty found.⁷ A levy by a tax-collector in Maryland is invalid if made without

¹ *Marshall v. Wadsworth*, 64 N. H. 386.

² *Springer v. United States*, 102 U. S. 356.

³ See *Richardson v. Boston*, 148 Mass. 508. Land under the control of a court cannot be seized for taxes due; and where land on which taxes are due has been sold under a decree of a court of equity, the tax-collector should ask to have the taxes paid out of the proceeds of sale: *County Com'rs v. Clarke*, 36 Md. 206.

⁴ For cases concerning Georgia tax-executions, see *Lingo v. Harris*, 73 Ga. 84; *Hight v. Fleming*, 74 Ga. 592; *Byars v. Curry*, 75 Ga. 515; *Short v. State*, 79 Ga. 550; *State v. Hancock*, 79 Ga. 799; *National Bank v. Danforth*, 80 Ga. 55; *Livingston v. Anderson*, 80 Ga. 175; *Brown v. Powell*, 50 Ga. 603; *Wright v. Central R. & B. Co.*, 85 Ga. 649; *Clarke v. Douglass*, 86 Ga. 125; *Boyd v. Wilson*, 86 Ga. 379; *Wilson v. Herrington*, 86 Ga. 777; *Carson v. Forsyth*, 94 Ga. 617; *Hitchcock v. Latham*, 97 Ga. 253; *Sparks v. Lowndes County*, 98 Ga. 284; *Leonard v. Pilkington*, 99 Ga. 738; *Brooks v. Matledge*, 100 Ga. 367; *Bacon v. Savannah*, 105 Ga. 62; *Du Bignon v. Brunswick*, 106 Ga. 317; *Brumley v.*

Harris, 107 Ga. 257; *Hilton v. Singleary*, 107 Ga. 821; *Funkhouser v. Male*, 110 Ga. 766; *Montford v. Allen*, 111 Ga. 18; *Vickers v. Hawkins*, 111 Ga. 119; *Georgia Trading Co. v. Marion County (Ga.)*, 40 S. E. Rep. 250. As to interest on tax-executions, see *Sparks v. Lowndes County*, *supra*; *Bacon v. Savannah*, *supra*. It is held in South Carolina that failure to specify on a tax-execution the amount of the taxes separately for such fund does not avoid the sale where the aggregate tax is correctly stated: *Interstate B. & L. Assoc. v. Waters*, 50 S. C. 459.

⁵ *Norris v. Coley*, 100 Ga. 547.

⁶ *Waycross Lumber Co. v. Burbage*, 97 Ga. 611. A tax-collector has power to issue execution against either wild or improved lands: *Gardner v. Donaldson*, 80 Ga. 71. As to tax-executions against wild lands in Georgia, see, also, *Rish v. Ivey*, 76 Ga. 738; *Scott v. Stewart*, 84 Ga. 772; *Brown v. Powell*, 85 Ga. 603; *Horne v. Johnson*, 87 Ga. 448; *Redgood v. McLain*, 89 Ga. 793; *Leonard v. Pilkington*, 99 Ga. 738; *Geer v. Ferguson*, 104 Ga. 552; *Bentley v. Shingler*, 111 Ga. 780.

⁷ *Watson v. Swann*, 83 Ga. 198.

an entry on the land.¹ Land levied upon must be described with sufficient certainty to enable the property to be identified,² and a grossly excessive levy renders sales and deeds thereunder void.³ Tax executions upon lands cannot be transferred to a person who has paid the taxes to the state.⁴

Lien upon lands. To authorize a sale of lands for taxes a lien must exist, either created in terms by the statute itself, or established by some official proceedings under the statute. Municipal corporations, it need hardly be said, have no authority to create liens by ordinance or otherwise, when none has been expressly conferred upon them.⁵ The general rule is that taxes are not a lien unless expressly made so;⁶ and when liens are

¹ Duvall v. Perkins, 77 Md. 582. Seizure by entry held sufficiently shown by indorsement on levy: Textor v. Shipley, 86 Md. 424.

² Duvall v. Perkins, 77 Md. 582. This case holds that levies by a tax-collector on "Pt. of Mount Airy 209½a.," are invalid for insufficiency of description. But the description in the levy is needed for location and identification of the property, and not for exact description: Textor v. Shipley, 86 Md. 424. A description clearly distinguishing the property from other property of like character, and rendering it capable of exact identification, is sufficient: Collins v. Boring, 96 Ga. 360. The levy of a tax *fl. fa.* upon "the west half of city lot number 79, on the corner of Broad street, in the city of," etc., sufficiently describes the property seized: Morgan v. Burks, 90 Ga. 287. Estoppel to object to ambiguity in levy and advertisement: Boyd v. Wilson, 86 Ga. 379.

³ Morris v. Davis, 75 Ga. 169; Brinson v. Lassiter, 81 Ga. 40; Mixon v. Stanley, 100 Ga. 372; Williamson v. White, 101 Ga. 276; Hobbs v. Hamlet, 106 Ga. 403. See Hilton v. Singletary, 107 Ga. 821. A levy and sale by an officer upon and of a lot fronting forty-seven feet on a cer-

tain street when the execution directed him to levy upon twenty feet only, is illegal: Brumley v. Harris, 107 Ga. 257. But a levy of a wild-land tax *fl. fa.* cannot be attacked as excessive when issued against the particular parcel, and not against the owner: Vickers v. Hawkins, 111 Ga. 119. Who can attack levy as excessive, see Bank of University v. Athens Sav. Bank, 107 Ga. 246. Owner's assent precludes complaint: Jones v. Johnson, 60 Ga. 260.

⁴ Johnson v. Christie, 64 Ga. 117. Executions in tax suits are to be served as in other cases: Georgia v. Atlanta, etc. R. Co., 3 Woods 434.

⁵ Philadelphia v. Greble, 38 Pa. St. 339. As to what will give the power, see Eschbach v. Pitts, 6 Md. 71.

⁶ Heine v. Levee Com'rs, 19 Wall. 655; Meriwether v. Garrett, 102 U. S. 472; Tompkins v. Railway Co., 18 Fed. Rep. 344; Gifford v. Callaway, 8 Colo. App. 359; Albany, etc. Co. v. Meriden, 48 Conn. 243; Palmer v. Pettingill (Idaho), 55 Pac. Rep. 653; Garrettson v. Schofield, 44 Iowa 35; Jaffray v. Anderson, 66 Iowa 718; Bibbins v. Clark, 90 Iowa 230; State v. Bellin, 79 Minn. 131; Jefferson City v. Whipple, 71 Mo. 519; McNish v. Perrine, 14 Neb. 582; Otoe County v. Mathews,

expressly created they are not to be enlarged by construction.¹ If, therefore, the statute in terms makes the tax a lien on one species of property, it will not by intendment be extended to any other species.² And if in terms it makes the tax a lien on all property and rights of property of the person taxed, the lien will be limited to property and rights owned when the tax accrued.³

Not only is it competent for the state to charge land with a lien for the taxes imposed thereupon, but the legislature may, if it shall deem it proper or necessary to do so, make the lien a first claim on the property, with precedence of all other claims and liens whatsoever, whether created by judgment, mortgage, execution, or otherwise, and whether arising before or after the execution of the tax.⁴ When that is done the lien

18 Neb. 466; *Linn v. O'Neil*, 55 N. J. L. 58; *People's Savings Bank v. Tripp*, 13 R. I. 621; *Quimby v. Wood*, 19 R. I. 571; *Jodon v. Brenham*, 57 Tex. 655; *Phelan v. Smith*, 22 Wash. 397; *Board of Education v. Old Dominion, etc. R. Co.*, 18 W. Va. 441; *Lobban v. State*, 9 Wyo. 377. This is also true of special assessments made on account of the improvement of streets: *Eagle Manuf. Co. v. Davenport*, 101 Iowa 493. Under a charter enacting that fire-district officers shall, in assessing and collecting taxes, take such proceedings as are had in such matters by the corresponding officers of towns — the laws providing that all town taxes shall be liens on the property against which they are assessed, and authorizing town-collectors to levy on and sell land "liable" for payment of taxes — fire-district taxes are not liens on the land against which they are assessed: *Quimby v. Wood*, *supra*.

¹ *United States v. Pacific R. Co.*, 4 Dill. 71; *Creighton v. Manson*, 27 Cal. 613; *Bibbins v. Clark*, 90 Iowa 230; *Phelan v. Smith*, 22 Wash. 397; *Lobban v. State*, 9 Wyo. 377.

² *Anderson v. State*, 23 Miss. 459; *Bailey v. Fuqua*, 24 Miss. 497. See *Creighton v. Manson*, 27 Cal. 613;

Howard v. Augusta, 74 Me. 79. An assessment on merchandise or money at interest does not, although duly recorded, operate as a privilege on immovables of the taxpayer: *Saloy v. Woods*, 40 La. An. 585.

³ *United States v. Pacific R. Co.*, 4 Dill. 71. In Iowa a tax on real estate may become a lien on real estate acquired subsequently to the assessment; if it becomes delinquent, it is brought forward on the books for a subsequent year, the same as if it were assessed against the land: *Cummings v. Easton*, 46 Iowa 183. If the statute makes a distiller's tax a lien on the land upon which the distillery is situated, it will not be applied to a case where the owner of a distillery has erected it upon the land of another without the consent of the latter: *Endgar v. Bates*, 52 Ga. 285. The purchaser at a sheriff's sale of lands, subject to a lien for taxes, does not become personally liable for the taxes, and they cannot be collected from his personalty unless perhaps from emblements which were attached to the land: *Blodgett v. German, etc. Bank*, 69 Ind. 153; *Forman v. Chase*, 68 Ind. 500; *Volger v. Sidener*, 86 Ind. 545.

⁴ *Provident Inst. v. Jersey City*, 113

does not stand on the same footing with an ordinary encumbrance, but attaches itself to the *res* without regard to individual ownership, and if enforced by sale of the land the pur-

U. S. 506; California L. & T. Co. v. Weis, 118 Cal. 489; Gledney v. Deavors, 8 Ga. 479; Freeman v. Atlanta, 66 Ga. 617; Wilson v. Boyd, 84 Ga. 34; Almy v. Hunt, 48 Ill. 45; Binkert v. Wabash R. Co., 98 Ill. 205; Cooper v. Corbin, 105 Ill. 224; Isaacs v. Decker, 41 Ind. 410; Morris v. Lallaurie, 39 La. An. 47; Blossom v. Van Court, 34 Mo. 390; McLaren v. Shieble, 45 Mo. 130; Stafford v. Fizer, 82 Mo. 393; Merriam v. Goodlett, 36 Neb. 384; Eddy v. Kimerer (Neb.), 85 N. W. Rep. 540; Trustees v. Trenton, 30 N. J. Eq. 667; Patterson v. O'Neill, 32 N. J. Eq. 386; Lydecker v. Palisade Tax Co., 33 N. J. Eq. 415; Hand v. Jersey City, 41 N. J. Eq. 663; Doremus v. Cameron, 49 N. J. Eq. 1; Cadmus v. Jackson, 52 Pa. St. 295; Wallace's Estate, 59 Pa. St. 501; Dungan's Appeal, 68 Pa. St. 204; Thomas v. Jones, 94 Va. 756. A statute which declares that a tax shall continue a lien "until fully paid and discharged," *ex proprio vigore* makes the lien superior to that of a judgment obtained before the tax was levied: Eaton's Appeal, 83 Pa. St. 152. The state's lien for taxes is paramount to any interest of a widow in her husband's estate, and her interest may be subjected to sale upon failure to pay such taxes: Rohrer v. Oder, 124 Mo. 24. The claim of homestead is in South Carolina subordinate to the payment of taxes, and the purchaser at a tax sale takes free from such claim: Shell v. Duncan, 31 S. C. 547. A lien for taxes accruing on property of a decedent's estate is prior to the rights of creditors whose claims arose in the life-time of the deceased and were reduced to judgment after that event and before the taxes were assessed: Commonwealth v. Ashlin's Adm'r, 95 Va. 145. Where

a national bank becomes insolvent taxes against its real estate and the penalties for non-payment thereof—the two constituting but one claim and not distinct claims—are paramount to the claims of any other person against the property in the receiver's hands: Gray v. Logan County, 7 Okl. 321. One who purchases at a sale under a judgment-lien takes the land subject to a lien thereon for taxes: Ferris v. Berkshire L. Ins. Co., 139 Ind. 486. If taxes are unpaid the legislature can revive a lapsed lien or even create a new lien for the same as against one who was owner when the taxes were levied, no right of third persons having intervened: In re Report of Com'rs, 49 N. J. L. 488. Though the charter of a corporation gives a "prior" lien to secure the payment of bonds which the corporation is authorized to issue, and exempts from city taxation the corporate property, yet, if the exemption is subsequently withdrawn by the legislature, the city has a prior lien for taxes thereafter imposed: Newport v. Masonic Temple Assoc. (Ky.), 46 S. W. Rep. 697. The legislature may make a special assessment for a local improvement a lien upon the property with precedence over a mortgage executed before the improvement was made: Morey v. Duluth, 75 Minn. 221. See Burke v. Lukens, 12 Ind. App. 648; Dressman v. Farmers' & T. Nat. Bank, 104 Ky. 694; Dressman v. Semonin (Ky.), 47 S. W. Rep. 767; Seattle v. Hill, 14 Wash. 487. But a statute providing that a city assessment shall be a first lien, and that the bonds issued therefor shall be conclusive evidence of the validity of such lien, is invalid: Ramish v. Hartwell, 126 Cal. 443. Under a

chaser will take a valid and unimpeachable title.¹ In some states the statute is found to go even further than this, and to give a lien on the land for taxes assessed against its owner in respect of any of his property, real or personal. The competency of this legislation is unquestionable,² although the rule

statute giving tax-liens priority over mortgages, an addition of five per cent. imposed for delay is part of the tax and also has priority: *Titusville's Appeal*, 108 Pa. St. 600. Taxes and assessments do not, irrespective of statute, have precedence over mortgages taken to secure funds in court and invested in the name of the chancellor as the agent of the state, or over mortgages executed to state sinking fund commissioners: *Rahway v. Commissioners* (N. J.), 18 Atl. Rep. 56; *Elizabeth v. Chancellor*, 51 N. J. L. 414; *Pugh v. Commissioners*, 53 N. J. L. 629; *Trustees v. Taylor*, 30 N. J. Eq. 618; *Trustees v. Trenton*, 30 N. J. Eq. 667; *Jersey City v. Foster*, 32 N. J. Eq. 825; *Trustees v. Shotwell*, 45 N. J. Eq. 106; *Chancellor v. Van Hovenburg* (N. J.), 45 Atl. Rep. 439. Under the South Carolina statutes it is held that the lien for taxes does not take priority over the inchoate right of dower which had attached before the lien arose: *Shell v. Duncan*, 31 S. C. 547. A lien for liquor-taxes on property used in carrying on the liquor business is not superior to a mortgage existing at the time the lien attaches: *Smith v. Skow*, 97 Iowa 640. Under the Delaware statute a tax-lien does not become paramount to a mortgage unless levy is made before the mortgage is foreclosed; the assessment alone is not sufficient: *Rhoads v. Given*, 5 Houst. 183. In Indiana a mortgage executed prior to the filing of a petition for the construction of a drain has priority over the lien of the assessment for such construction: *State v. Loveless*, 133 Ind. 600, following *Cook v. State*, 101 Ind.

446; *State v. Ætna L. Ins. Co.*, 117 Ind. 251, and *Pierce v. Ætna Ins. Co.*, 131 Ind. 284. Failure to file, as required by the Pennsylvania statute, a certified copy of the taxes due the state on land until the day after the land is sold under a mortgage foreclosure, postpones the lien of the taxes to the mortgage-lien: *Gladden v. Chapman*, 188 Pa. St. 586. In Connecticut the lien for taxes assessed against the owner of mortgaged land takes precedence of the mortgage only so far as the valuation of the particular tract is concerned, and not as to taxes on the mortgager's other property: *Meyer v. Burritt*, 59 Conn. 117. If a tax judgment combines taxes on a number of parcels, some of which are, and some of which are not, embraced in a mortgage, the latter is not postponed to the judgment: *Kepley v. Jansen*, 107 Ill. 79.

¹ *Osterberg v. Union Trust Co.*, 93 U. S. 424; *California L. & T. Co. v. Weis*, 118 Cal. 489; *Spratt v. Price*, 18 Fla. 289; *Smith v. Cassidy*, 75 Miss. 916. See *Biscoe v. Coulter*, 18 Ark. 423; *Paulson v. Rule*, 49 Iowa 576; *Parker v. Baxter*, 2 Gray 185; *Dale v. McEvers*, 2 Cow. 118. The lien of a local assessment for street paving attaches to the property of the abutting proprietor without reference to the person in whom title is absolutely vested: *Rosetta Gravel, etc. Co. v. Jollisaint*, 51 La. An. 804.

² *Gifford v. Callaway*, 8 Colo. App. 359; *Albany Brewing Co. v. Meriden*, 48 Conn. 243; *Palmer v. Pettingill* (Idaho), 55 Pac. Rep. 653; *Bodertha v. Spencer*, 40 Ind. 353; *Isaacs v. Decker*, 41 Ind. 410; *Peckham v.*

in most of the states is that the lien on each tract of land is for the taxes against such tract only.¹ And in any of these

Mullikan, 99 Ind. 352; Geren v. Gruber, 26 La. An. 694; Burfiend v. Hamilton, 20 Mont. 343. See United States v. Pacific R., 4 Dill. 71, where a demand was held necessary to create and bring into operation this lien. Such a demand should state the amount of the tax and demand payment thereof: Ibid. In California, taxes assessed on personalty to the owner of improvements are a lien on the latter, which, in that state, are realty for the purpose of taxation: People v. Smith, 123 Cal. 70. Under the Iowa code taxes assessed on a firm's personalty are a lien on a partner's land: Bibbins v. Clark, 90 Iowa 230. In several states a lien on land for personal taxes is held to be subordinate to a prior mortgage upon the land: Gifford v. Callaway, 8 Colo. App. 359; Bibbins v. Clark, 90 Iowa 230; Bibbins v. Polk County, 100 Iowa 493; State v. Newark, 42 N. J. L. 38; Miller v. Anderson, 1 S. D. 539; Lobban v. State, 9 Wyo. 377. But otherwise in California: California L. & T. Co. v. Weis, 118 Cal. 489. Where all taxes are by statute made a lien upon land in preference to all other liens, the collector's failure to make the tax from personalty when he could do so will not defeat or postpone the lien: Germania Savings Bank's Appeal, 91 Pa. St. 345. See, on the same subject, Cairo, V. & C. R. Co. v. Mathews, 152 Ill. 153; Mt. Carmel, etc. Co. v. People, 166 Ill. 199; Julian v. Stephens (Ky.), 11 S. W. Rep. 6; Berwin v. Legras, 28 La. An. 352; State v. Newark, 42 N. J. L. 38; Kean v. Kinnear, 171 Pa. St. 639. And see, also, *ante*, p. 825. Where the tax-collector's books show the amount of personalty taxes remaining unpaid, and specify, as the statute requires, the particular parcels of land against which taxes are to be

charged, it will be presumed that such charge had become necessary because the tax could not be made out of personal property: Shelbyville Water Co. v. People, 140 Ill. 545. Under a statute requiring the collector to specify some particular tract to charge with personalty taxes, it was proper, in the case of a railroad company, to select its entire right of way in the county as listed for taxation: Cairo, V. & C. R. Co. v. Mathews, 152 Ill. 153. Personal taxes were properly charged against the land where the collector made an effort in good faith to collect the taxes from personalty, and where no others had rights in the lands, even though, as matter of fact, tangible security belonging to the tax-debtor was in the county: Matzenbaugh v. People (Ill.), 62 N. E. Rep. 5. It was held in Iowa Land Co. v. Douglas County, 8 S. D. 491, that failure to bring forward personal taxes for preceding years, and extend the same upon the real-estate tax-list, or to sell the land on which there were a lien, did not, as against subsequent encumbrancers of the land, release the land from the lien. In Linn v. O'Neil, 55 N. J. L. 58, the absence of provisions whereby a lien could be established on lands for taxes assessed against personalty was declared.

¹ Meriden v. Maloney, 74 Conn. 90; State v. Baker, 49 Tex. 763; Edmonson v. Galveston, 53 Tex. 157; Jodon v. Brenham, 58 Tex. 655. Unpaid special assessments held not to be a lien on other lands of the owner of the property benefited: Hutchinson v. Rochester, 92 Hun 393. All the property of a railroad being assessed as a unit, and the tax being due as a unit, it is a lien on all the property assessed: Maricopa & P. R. Co. v. Arizona, 156 U. S. 347. It is held in

cases a change in ownership would not affect the lien; the law not taking notice of the change.¹

If the statute deals with particular interests in land rather than the land itself, and assesses such interests separately, previous liens will not in general be divested,² though they

Connecticut that a tax-lien cannot be enforced against land which was not set by the assessors in the list of the person in whose name it stood on the land records: *Hellman v. Burritt*, 62 Conn. 438.

¹ *Pittsburgh, C., C. & St. L. R. Co. v. Harden*, 137 Ind. 486; *Oldhams v. Jones*, 5 B. Monr. 458; *Covington v. Boyle*, 6 Bush 204; *Morris v. Lalaurie*, 39 La. An. 47; *Kansas City v. Railroad Co.*, 77 Mo. 180. A sale of a bankrupt's land by his assignee does not divest the lien of the state for taxes due upon the land, even though the sale was declared to be free of encumbrances: *Stokes v. State*, 46 Ga. 412. So where land assessed for taxes was sold under a decree—to which the state was not a party—ordering a sale thereof free from all encumbrances and liens: *Bloxham v. Consumers' Electric L. & S. R. Co.*, 36 Fla. 519. A private sale of a decedent's land was held not to discharge a lien for taxes and make it a charge on the proceeds of the sale: *In re Steen's Estate*, 175 Pa. St. 299. If land subject to a tax-lien is alienated, and is afterwards sold on execution against the alienee, the lien of the tax is not divested: *Freeman v. Atlanta*, 66 Ga. 617. And see *Mesker v. Koch*, 76 Ind. 68; *Rinard v. Nodyke*, 76 Ind. 130. And the fact that the alienor has become bankrupt is of no importance: *Mesker v. Koch*, *supra*. A statutory lien in the state's favor is not divested by a sale of the road under federal process: *Atlanta, etc. R. Co. v. State*, 63 Ga. 483. See *Hartman v. Bean*, 99 U. S. 393. It has been held in Indiana that a sale of land on a school-

fund mortgage will not divest city tax-liens where the purchasers are the original mortgagees: *Logansport v. McConnell*, 121 Ind. 416. As to divestment, in Pennsylvania, of tax-liens by judicial sale, and as to payment of tax out of fund, see *Gormley's Appeal*, 27 Pa. St. 49; *Philadelphia v. Cooke*, 30 Pa. St. 56; *Pittsburgh's Appeal*, 40 Pa. St. 455; *Allegheny City's Appeal*, 41 Pa. St. 60; *Smith v. Simpson*, 60 Pa. St. 168; *Bryant's Appeal*, 104 Pa. St. 372; *Mellon's Appeal*, 114 Pa. St. 564; *Shaw v. Allegheny*, 115 Pa. St. 46; *Pottsville Lumber Co. v. Wells*, 157 Pa. St. 5. Where a statute provides that a ministerial officer, upon sale of property, shall pay all sums due and in arrear for taxes from the person whose property is sold, a tax which has become a lien, but is not yet in arrear, cannot be paid: *Wheeler v. Addison*, 54 Md. 41. When the sheriff sells property seized under a mortgage he must retain in his hands a sufficient amount of the price, regardless of the amount for which the property sold, to pay the taxes due thereon prior to the adjudication: *Schofield v. West's Succession*, 44 La. An. 277.

² See *Cadmus v. Jackson*, 52 Pa. St. 295. The constitutional provision in California relating to the taxation of mortgages does not give the mortgagee a distinct property in the land to which the lien of taxes cannot attach: *California L. & T. Co. v. Weis*, 118 Cal. 489. Under Oregon's mortgage tax-law the state's lien for unpaid taxes on a mortgage was held not discharged by the release of the mortgage: *Dekum v. Multnomah*

might be even in such cases — at least as far as they affected an interest assessed — if the statute so declared. It has been held that the interest due on delinquent taxes constitutes part of the tax-lien upon the property against which the original tax was a charge.¹

The time when the lien will attach to land must be determined by the terms of the statute. Sometimes the statute names a day as that from and after which the tax shall be a lien; and when that is done, it may determine, as between subsequent purchasers and encumbrancers, the liability for the tax.²

County, 38 Or. 253. In some states the tax-lien attaches to the life-estate alone, and does not affect the interest of the remainder-man: *Stovall v. Austin*, 16 Lea 700; *Ferguson v. Quinn*, 97 Tenn. 46; *State v. Campbell* (Tenn.), 41 S. W. Rep. 937; *Tabb v. Commonwealth*, 98 Va. 47. In Maryland taxes are liens upon the property itself, and not upon the interest of the life-tenant. If the latter neglects to pay the taxes the property charged with the lien may properly be sold. The collector before making the sale need not examine what title a party has to land for the taxes with which he is assessed: *Cooper v. Holmes*, 71 Md. 20. Further on this subject see *ante*, pp. 819, 820.

¹ *Leavitt v. Bell*, 59 Neb. 595.

² *Harrington v. Hilliard*, 27 Mich. 271; *Eaton v. Chesebrough*, 82 Mich. 214. See *Baldwin v. Mayne*, 42 Iowa 131; *McClure v. Campbell*, 25 Neb. 57; *Campbell v. McClure*, 45 Neb. 608; *Rundell v. Lakey*, 40 N. Y. 513; *Gormley's Appeal*, 27 Pa. St. 49; *Densmore v. Haggarty*, 59 Pa. St. 189. In Arkansas an assessment for improvements becomes a lien at once for its full amount: *Sanders v. Brown*, 65 Ark. 498. In California, the lien for taxes relates to the time of the assessment: *Reeve v. Kennedy*, 43 Cal. 643. But the lien for taxes on a railroad company's property is not created by the assessment, but attaches

on the first Monday in March in each year, and, after assessment has been made, and the amount of taxes ascertained, it is payable to the county in which the road-bed was included at the time the lien attached: *San Diego County v. Riverside County*, 125 Cal. 495. As to when taxes become a lien upon land in Georgia, see *Gledney v. Deavors*, 8 Ga. 479. In Illinois taxes upon real estate are a lien or charge upon the land itself from the first day of May in the year they are levied: *Almy v. Hunt*, 48 Ill. 45; *Cooper v. Corbin*, 105 Ill. 224. As to taxes on personalty becoming a lien on realty, see *Belleville Nail Co. v. People*, 98 Ill. 399; *Binkert v. Wabash R. Co.*, 98 Ill. 205; *Ream v. Stone*, 102 Ill. 359; *Sauf v. Morgan*, 108 Ill. 326; *Parsons v. Gas-Light Co.*, 108 Ill. 380. In Iowa taxes are not a lien upon land until they are due. The assessment does not make them a lien: *Castle v. Anderson*, 69 Iowa 428. "The commencement of the work" from which the Iowa statute provides that the lien of paving assessments shall attach, is not the letting of the contract, but the performance of labor or the furnishing of material under it: *Eagle Manuf. Co. v. Davenport*, 101 Iowa 493. Under the Louisiana statute the filing of an assessment roll in the office of the recorder of mortgages acts as a lien on each specific piece of land

Where no time is thus expressly named the lien should attach at the time when by an extension of the tax upon the roll a particular sum has become a charge upon a particular parcel

thereon assessed, and as a legal mortgage after December 31st of the current year: *Behan v. Board of Assessors*, 46 La. An. 870. In Michigan it was held that the provision in the general tax-law of 1889 by which taxes became a lien on real estate on the first day of December did not apply to city taxes in Detroit, which became a lien on the first day of July: *Eaton v. Chesebrough*, 82 Mich. 214. In Minnesota ownership of property on the first day of May determines liability for taxes, and the lien on realty is not divested by a subsequent sale to a corporation which has paid a percentage on its gross earnings in lieu of other taxes: *State v. Northwestern Tel. Exch. Co.*, 80 Minn. 17. In Missouri, taxes, both state and county, constitute a lien on real estate from and after the first Monday in September: *Blossom v. Van Court*, 34 Mo. 390; *McLaren v. Sheble*, 45 Mo. 130. Under the Nebraska statute taxes on real estate are a lien from and including the first day of April in the year in which they are levied until they are paid: *McClure v. Campbell*, 25 Neb. 57; *Campbell v. McClure*, 45 Neb. 608; *Cushman v. Taylor* (Neb.), 90 N. W. Rep. 207. Under a New Jersey statute providing that taxes should be a lien on lands "from the time when such taxes so assessed were payable," the time began to run at the day fixed by the collector — in the public notice the statute required him to give — when taxes would be receivable, not later than December 19th: *Johnson v. Van Horn*, 45 N. J. L. 136. In a statute making the tax a lien "from and after the date of levy and assessment," the term "levy and assessment" means the doing of whatever things are required to be

done to authorize the collector to gather the taxes; and a lien begins when the duplicate is completed and delivered to the collector: *Hohenstatt v. Bridgeton*, 62 N. J. L. 169. And under a statute providing that all taxes levied upon real estate shall be and remain a lien thereon for two years from and after the time when they shall be assessed, assessment means the imposition of a specific sum on the property of each taxpayer, and taxes do not become liens until the rate of taxation is fixed by the common council: *Hallinger v. Zimmerman* (N. J. Eq.), 51 Atl. Rep. 936. In New York a special assessment is not a lien until confirmed, inasmuch as no assessment can exist until the amount thereof is ascertained or determined: *Dowdney v. Mayor*, 54 N. Y. 156. In Texas the lien of the state arises out of the assessment of the property, and does not exist until that is made. The word "assessment" here means more than the sum ascertained as the tax to be charged against the property, but includes the procedure on the part of the officials by which the property is listed, valued, and finally, the *pro rata* declared: *Texas v. Farmer*, 94 Tex. 232. In Vermont taxes become a fixed encumbrance on the land on which they are assessed as soon as the officer having the collection in charge proceeds officially so far as to manifest his intention to pursue the land to enforce collection; and in the case of non-residents taxes become an encumbrance on the land when the constable has made a list of the land and the taxes assessed thereon, and deposited the same in the town clerk's office for record: *Hutchins v. Moody*, 34 Vt. 433.

of land.¹ As to the period during which the lien shall continue, that also must be determined by the statute;² the law in some states being that taxes cease to be a lien only with payment.³ The lien on land is not divested when the land is

¹ See *Cochran v. Guild*, 106 Mass. 29; *Lindsay v. Eastwood*, 72 Mich. 336; *Post v. Leete*, 8 Paige 337; *Dowdney v. New York*, 54 N. Y. 186; *Kern v. Towsley*, 45 Barb. 150; *Hutchins v. Moody*, 30 Vt. 165, 34 Vt. 433. Compare *Driggers v. Cassady*, 71 Ala. 529; *Holmes v. Taber*, 9 Allen 246; *Plymouth County v. Moore* (Iowa), 87 N. W. Rep. 662; *Hand v. Jersey City*, 41 N. J. Eq. 663. In California a lien for taxes relates to the time of the assessment: *Reeve v. Kennedy*, 43 Cal. 643. Under the Pennsylvania statute of 1824 taxes are liens as soon as they are "lawfully imposed or assessed:" *Dungan's Appeal*, 88 Pa. St. 414. See *Camac v. Beatty*, 5 Phila. 129. In Connecticut it seems that taxes are not a lien on real estate so long as there is personalty from which it may be made: *Briggs v. Morse*, 42 Conn. 258.

² Where the statute provided that "taxes assessed on real estate shall constitute a lien thereon for two years after they are committed to the collector," this is held to mean the first committing to the collector, and the time is not extended by the recommitting to a subsequently-appointed collector: *Russell v. Deshon*, 124 Mass. 342. If the statute provides that the state's lien for taxes shall not exist longer than five years, such lien is not extended by a money-judgment for taxes, although the period of limitations applicable to a judgment is fifteen years: *Kentucky Central R. Co. v. Commonwealth*, 92 Ky. 64. The New Jersey statute providing that taxes should remain a lien for two years "notwithstanding any devise, alienation, mortgage, or other encumbrance," held to include

the owner as well as the alienee, etc.: *Kirkpatrick v. New Brunswick*, 40 N. J. Eq. 46. In Rhode Island a tax on a resident for personalty and realty is a lien on all the lands for two years. As to the rule when lands have been aliened, see *Bull v. Griswold*, 14 R. I. 22. Period of limitation under city charter: *Doremus v. Cameron*, 49 N. J. Eq. 1. Where a certificate of sale of the land at public auction is requisite to continue a lien for city taxes beyond a certain limited period, it must be made before that period expires: In re Report of Com'rs, 49 N. J. L. 488. A five-year period of limitation held to apply only in favor of purchasers of the real estate: In re Cullen's Estate, 142 Pa. St. 18. A certificate under the Connecticut statute authorizing the continuance of a tax-lien, and the foreclosure thereof, construed and held insufficient as not giving the amount of the tax: *New Britain v. Mariners' Savings Bank*, 66 Conn. 528. For a case of extension, by statute, of the lien, see *Dunlop v. Minor*, 26 La. An. 117.

³ See *Adams v. Davis*, 109 Ind. 10; *Wells County v. McHenry*, 7 N. D. 246. As taxes in Indiana do not cease to be a lien until they are paid, it matters not that for certain intervening years taxes were dropped from the duplicate and placed upon a register of doubtful taxes: *Ibid.* That a lien for taxes is not, in Indiana, so far merged in a judgment for them as to preclude enforcement against the tax-debtor subsequently acquiring title from the purchaser at a sale under such judgment, where the proceeds of the sale were not enough to pay the taxes, see

purchased by a corporation, the property of which is exempt from taxation,¹ nor is it discharged by a personal action brought for the tax,² or by a personal judgment recovered against the land-owner;³ but where the tax is a mere debt with a lien for its security, it has been held that if lapse of time bars the debt the lien is gone also.⁴ A lien for taxes will not be merged in a judgment therefor so as to expire with the time fixed by statute for the expiration of a general judgment-lien.⁵ An attempted release by the county commissioners of a lien on realty for personal taxes will not, as against one who took a mortgage prior to such release, estop the county from enforcing the lien.⁶ Speaking generally, a lien arising from a valid levy and assessment will not be impaired, nor will the right to enforce it be defeated, by defects in proceedings subsequent to the assessment.⁷ Where the law requires that all liens on real property be recorded in order to affect third persons, the state has, without recording, a lien for taxes on land as against the owner to whom the tax was assessed; but recording is essential as against one to whom the owner conveyed after the tax became due;⁸ and recording after the grantee has acquired title will, as to him, be ineffectual.⁹ Of course, a state law requiring

Beard v. Allen, 141 Ind. 243. See Boyd v. Ellis, 107 Mo. 394. A statute providing that a lien for taxes shall continue until the same is paid does not affect limitations which, under previous decisions, are applicable to taxes and tax-judgments: State v. Bellin, 79 Minn. 131. In Arkansas an assessment for an improvement can be satisfied only by full payment: Sanders v. Brown, 65 Ark. 498.

¹ German Bank v. Louisville (Ky.), 56 S. W. Rep. 504; State v. Ewing, 11 Lea 172. See State v. Northwestern Tel. Exch. Co., 80 Minn. 17.

² Eschbach v. Pitts, 6 Md. 71.

³ People v. Stahl, 101 Ill. 346.

⁴ San Francisco v. Jones, 20 Fed. Rep. 188. See Sherwin v. Savings Bank, 137 Mass. 444.

⁵ Boyd v. Ellis, 107 Mo. 394. See Beard v. Allen, 141 Ind. 243.

⁶ Iowa Land Co. v. Douglas County, 8 S. D. 491.

⁷ See State v. Hurt, 113 Mo. 90; State v. Hutchinson, 116 Mo. 399. A property-owner's obligation to pay a tax for street improvements is not affected by the collector's omission to enforce collection against other property: Phelan v. San Francisco, 120 Cal. 1. As against the delinquent owner and his general creditors not secured by any lien on the land, failure to transmit to the proper county, as required by the statute, a certified copy of the lien for unpaid taxes does not avoid such lien: In re Goodwin Gas-Stove, etc. Co.'s Estate, 166 Pa. St. 296.

⁸ Adams v. Wakefield, 26 La. An. 592; New Orleans Savings Inst. v. Leslie, 28 La. An. 496; Cochran v. Dry-Dock Co., 30 La. An. 1365.

⁹ Jacob v. Preston, 31 La. An. 514.

liens to be recorded does not apply to tax-liens in favor of the United States, and, though such liens are not recorded, they may be enforced against the land in the hands of purchasers for value without notice.¹

In some states the lien of a municipality for taxes or assessments is subordinate to that of the state.² But in others they stand upon an equal footing, and a sale upon one divests the other.³ In still others the state and municipal taxes go upon the same roll, and the lien is for all together.⁴

"Tax-liens," it is said, "take priority in the reverse order of other liens. As to all other liens the first in order of time is *prima facie* superior to those of a later date. In the case of tax-liens, however, the 'last shall be first and the first last.' The general and universal rule is that in proceedings *in rem* to enforce the payment of taxes the last tax levied and sought to be enforced is superior and paramount to the lien of all other taxes, claims, or titles."⁵ The effect of a sale for taxes as barring or precluding liens for other taxes will be considered in the chapter which follows.

Suits in rem. Statutory provision for the enforcement by suit of the lien for delinquent taxes are not unusual. Although not inherently necessary it is both appropriate and convenient

¹ United States v. Snyder, 149 U.S. 210.

² Hargrove v. Lilly, 69 Ga. 326; White v. Knowlton (Minn.), 86 N. W. Rep. 755; McMillan v. Tacoma (Wash.), 67 Pac. Rep. 68. The lien for state taxes in Indiana is superior to that of a ditch assessment: McCollum v. Uhl, 128 Ind. 304.

³ Justice v. Logansport, 101 Ind. 326, citing Denike v. Rourke, 3 Biss. 39; Dennison v. Keokuk, 45 Iowa 266. As to railroad taxes, see Crowell v. Merrill, 60 Iowa 53.

⁴ In Louisiana a sale for a state tax will not divest a lien for a city tax, unless the sale realizes sufficient to pay both: Bellocq v. New Orleans, 31 La. An. 471. See, to the same effect, in Iowa, Dennison v. Keokuk, 45 Iowa 266.

⁵ State v. Camp, 79 Minn. 343. See Wass v. Smith, 34 Minn. 304. Where land sold for taxes was redeemed by the delinquent it became subject to the lien of prior delinquent taxes: Winter v. City Council, 101 Ala. 649. The New Jersey statute giving a tax-lien priority over other encumbrances does not apply to prior liens for taxes held by the state: Smith v. Specht, 58 N. J. Eq. 47. In Pennsylvania, where a city has tax-claims against the same property, superior liens or equities do not intervene; the statute does not give one precedence over the other: Duffy v. Philadelphia, 42 Pa. St. 192; Philadelphia v. Meager, 67 Pa. St. 345; Townsend v. Prowattain, 81½ Pa. St. 139.

that before selling land a judicial determination of the delinquency be had. A judicial hearing in such a case may fairly be understood to have in view, *first*, the protection of the parties taxed, by giving them the opportunity to inspect the proceedings and make their objections before the final steps are taken which might conclude their rights forever; and, *second*, the greater security of purchasers at the sales, which may reasonably be supposed to follow a judicial determination that the proceedings are such as, under the law, will justify a sale being made. The proceeding is not judicial in the strict sense; it is but a step in an administrative proceeding in which judicial assistance is invoked as a matter of convenience, and because with its assistance the rights of parties can be most surely protected, and the public interest at the same time conserved.¹ The proceeding gives an opportunity for the taxpayer to be heard after all the steps to establish his liability have been taken, but before the presumptions arising from a sale and conveyance have attached, and when, if the objections he takes to the official action are overruled, he may by payment escape such loss of property as is inevitable if his land is first sold, and a hearing upon the legality of the sale which results adversely to him is had afterwards. The judicial proceeding before sale seems, therefore, especially favorable to the interests of taxpayers, and deserving of further adoption for that reason if properly guarded.

¹ "When the state, or a local division of it acting under a law of the state, seizes and sells lands for the non-payment of taxes, or of public charges in the nature of taxes, imposed on such land, the proceeding is administrative and not judicial. The legislature may or may not make use of judicial forms or judicial tribunals, as shall seem most convenient, or most conducive to the object in view, and most advantageous to the state and to the taxpayers. The general laws for the assessment and levying of state and county taxes, and the special statutes under which assessments are laid and collected in cities and villages, are examples of this kind of legislation.

No judgment of a court is ordinarily required from the commencement to the conclusion of the process, and if a judicial agency for some part of the proceeding is provided in particular cases, as in the confirmation of the report of commissioners of estimate and assessment in the city of New York, it is not because the matter is judicial in its nature, or because such a mode of determining questions is, in such cases, required by any provision of the constitution, but merely from considerations of convenience and general propriety: "Davis, Ch. J., in Matter of New York Prot. Epis. School, 31 N. Y. 574. See Pritchard v. Madren, 24 Kan. 486, 491.

It has not been deemed advisable, in a work so general in its plan as the present, to enter at large into an examination of the proceedings for which provision is made under statutes of different states. The same general principles apply to them all.¹ In some cases — usually cases of street or other special

¹Tax-liens in Connecticut may be enforced by foreclosure: *Cole v. Rice* (Conn.), 51 Atl. Rep. 1083. In Florida a lien on lots along which sidewalks are constructed by a city under an ordinance may be enforced in equity: *Huff v. Jacksonville*, 39 Fla. 1. In Illinois the present constitution provides that in all cases where it is necessary to sell real estate for the non-payment of taxes or assessments for state, county, or municipal purposes, a return shall be made to some general officer of the county having authority to receive state and county taxes; and such officer alone, upon the order or judgment of some court of record, shall have the power to sell: *Hills v. Chicago*, 60 Ill. 86; *Otis v. Chicago*, 62 Ill. 299; *Webster v. Chicago*, 62 Ill. 302. That provision, however, has been held not retrospective so as to invalidate a sale made otherwise for a tax levied before the constitution was adopted: *Garrick v. Chamberlain*, 97 Ill. 620. Liens for drainage taxes in Illinois may be foreclosed in equity, and such a suit is properly brought in the name of the people: *People v. Weber*, 164 Ill. 412. See, also, *Samuels v. Drainage Com'rs*, 125 Ill. 256. Equity cannot, however, give assistance when the statute has provided another remedy; but the officer will be left free to follow the latter: *People v. Biggins*, 96 Ill. 381. In Indiana liens for assessments for constructing gravel roads may be enforced as in case of taxes generally: *Bothwell v. Millikan*, 104 Ind. 162. It has been decided in Kansas that there is no constitutional objection to providing for the enforcement of a tax by fore-

closure of the lien instead of by sale of property: *Pritchard v. Madren*, 24 Kan. 486. Under the present tax-law of Michigan a petition for a decree of sale is filed by the auditor-general of the state in the circuit court in chancery for the county in which the land lies, and the procedure follows the ordinary chancery practice: See *Auditor-General v. Jenkinson*, 90 Mich. 523; *Auditor-General v. Hutchinson*, 113 Mich. 245; *Wood v. Bigelow*, 115 Mich. 123; *Connecticut Mut. L. Ins. Co. v. Wood*, 115 Mich. 444. Drainage taxes in Michigan, when re-assessed, are to follow the course of other taxes, and be collected in the same manner: if necessary, by sale for non-payment: *Bump v. Jepson*, 106 Mich. 641. In Missouri the statute provides for an action in which judgment is taken against the land: See *Graves v. Ewart*, 99 Mo. 13; *Blevins v. Smith*, 104 Mo. 583. And in that state there is also a proceeding on special bills to collect assessments for local improvements: See *Strassheim v. Jerman*, 56 Mo. 105; *Carlin v. Cavender*, 56 Mo. 286; *St. Louis v. Bressler*, 56 Mo. 350; *Kansas v. Rice*, 89 Mo. 685. In Nebraska the state sells the tax and authorizes the purchaser to collect it by foreclosure of the lien therefor and sale of the property: *Leigh v. Green* (Neb.), 90 N. W. Rep. 255. The proceeding in North Dakota for the collection of taxes is not a single suit but as many suits as there are parcels of land; and if the same person owns several parcels such suits are consolidated by joining the parcels in a single answer: In *re Stutsman County* (N. D.), 88 Fed. Rep. 337. In

assessments — the judicial proceedings begin when the assessors have completed their work, and the assessment is examined and confirmed before process for collection is issued; or, if the assessment is found to be defective, or is believed to be unjust, it is set aside at that stage, and the case sent back to the assessors for new action; or the proceedings are simply quashed, leaving the authorities to begin anew if they shall think it advisable to do so.¹ The local statutes differ so much in the authority they confer upon the courts, that the decisions made in one state are commonly of little service as affording a guide to the action of courts in other states. Under some statutes the action of the assessing boards is allowed to be reviewed on the facts as well as on the law; under others, only questions of the regularity and legality of the proceedings are submitted to the court. More generally the court takes up the case at the point where the collector has demonstrated his inability to collect the tax from residents by distress and sale of goods and chattels, and when the tax upon non-resident or unseated lands has remained unpaid for the period allowed by law for making

Pennsylvania, under the statute of 1846, taxes assessed against land after the owner's death were held collectible only by proceedings *in rem*: In *re Steen's Estate*, 175 Pa. St. 299. In Texas a municipal corporation can maintain suits to enforce and collect liens for taxes: *Henrietta v. Eustis*, 87 Tex. 14; *McCrary v. Comanche* (Tex. Civ. App.), 34 S. W. Rep. 679. See *San Antonio v. Berry*, 92 Tex. 319. In West Virginia the right of a municipality to sue in equity to enforce a tax is regarded as a purely statutory one: *Board of Education v. Old Dominion, etc. Co.*, 18 W. Va. 441. While in Tennessee the chancery courts seem to have inherent jurisdiction for the enforcement of liens for taxes, and a statute creating a new remedy, without expressly repealing the old, will be understood as giving a cumulative remedy: *State v. Duncan*, 3 Lea 679. See *Nashville v. Cowan*, 10 Lea 209; *Memphis v.*

Looney, 9 Baxt. 130; *Edgefield v. Brien*, 3 Tenn. Ch. 673.

¹ Special assessments for local improvements are required in the state of New York to be reported to a court for confirmation, and the reported cases passing upon them are so numerous that the mere list would occupy several pages. So far as points decided are of general interest they have been given in different parts of this work. That the court in passing upon the assessment cannot review political action, such as the determination of the necessity or propriety of opening the street, or the proper limits of an assessment district, see *Matter of Albany Street*, 11 Wend. 149; *Matter of William and Anthony Streets*, 19 Wend. 678; *Matter of John and Cherry Streets*, 19 Wend. 659; *Matter of Livingston Street*, 18 Wend. 556. And see the cases cited *ante*, p. 69.

voluntary payment, before compulsory proceedings are suffered to be resorted to.

In any judicial proceeding the court which assumes to act must have that authority of law for the purpose, which is called jurisdiction. This consists in, *first*, authority over the subject-matter, and *second*, authority over the parties concerned. The first comes from the statutory law, which designates the particular proceeding as one of which the court may take cognizance when the parties are properly before it; the second comes from the proper institution of proceedings, and the service of process upon the parties concerned, or something which is by the statute made equivalent to such service. Concerning jurisdiction of the subject-matter, it is only necessary to observe that it must come wholly from the constitution or statutes of the state; the common law giving to the courts no authority in such cases. Moreover, that which is conferred is a special and limited jurisdiction. The importance of this fact appears in that familiar principle that nothing is taken by intendment in favor of the action of a court of special and limited jurisdiction, but it must appear, by the recitals of the record itself, that the facts existed which authorized the court to act, and that in acting the court has kept within the limits of its lawful authority. This principle is applicable to the case of a court of general jurisdiction, which in the particular case is exercising this peculiar special and limited authority, as well as to the case of special courts created for such special and limited authority only.¹

¹ McClung v. Ross, 5 Wheat. 116; Thatcher v. Powell, 6 Wheat. 119; Francis's Lessee v. Washburn, 5 Hayw. 294; Tift v. Griffin, 5 Ga. 185; Graceland, etc. Co. v. People, 92 Ill. 616; Frew v. Taylor, 106 Ill. 159; Biggins v. People, 106 Ill. 270; Guisebert v. Etchison, 51 Md. 478; Bridge v. Ford, 4 Mass. 641; Smith v. Rice, 11 Mass. 511; Wood v. Bigelow, 115 Mich. 123, 125, 126; Connecticut Mut. L. Ins. Co. v. Wood, 115 Mich. 444; Dakin v. Hudson, 6 Cow. 221; Deming v. Corwin, 11 Wend. 647; Sheldon v. Wright, 5 N. Y. 497; Perrine v. Farr, 22 N. J. L. 356; Jennings v. Stafford, 1 Ired. 404; Harshaw v. Taylor, 3 Jones (N. C.), 513; Barrett v. Crane, 16 Vt. 246. It was said in Auditor-General v. Hutchinson, 113 Mich. 245, that the statute conferring upon courts of equity jurisdiction to decree sale of lands delinquent in paying taxes was intended to prevent prudent and honest men from paying more than their share of the public burdens, and should be construed liberally. That proceedings in these cases are governed by the same principles which govern other judicial sales, see Jones v. Gillis, 45 Cal. 541; Eitel v. Foote, 39 Cal. 439. See Ewart v. Davis, 76 Mo. 129.

When suit to enforce a tax-lien against land has been provided for, mere delay in instituting such suit will not, it has been held, extinguish the lien.¹ The lien is but an incident to the tax; and when an action to recover the debt is barred, the suit to enforce the lien is barred also.² If a time for proceedings to enforce a lien is limited by statute, it is sufficient if they are begun within the time, and they may proceed afterwards to judgment.³ In California an action to recover a personal judgment and to enforce the lien for taxes on the land is an "action upon a liability created by statute," and must be brought within the period prescribed by the general statute of limitations, although taxes have by statute the force of judgments.⁴ So in Minnesota, a proceeding under the tax-law to obtain judgment against the land is deemed an "action upon a liability created by statute," and is, therefore, subject to the general six-year period of limitations.⁵ But in North Dakota

¹Swan v. Knoxville, 11 Humph. 130, 132. An act of congress making a tax a lien on land for two years did not preclude the land's being sold for the tax after the two years had expired, the title not having changed: Holden v. Eaton, 7 Pick. 15. So, a statute relating to the continuance of a tax-lien on real estate was held not to limit the time in which the tax might be enforced, but to fix the time beyond which such lien should not have precedence over other liens: White v. Portland, 68 Conn. 293. A Maryland statute providing that taxes shall be collected in four years has no application when taxes could not be collected within that time because the property was *in custodia legis*: Hebb v. Moore, 66 Md. 167. Failure for eight years to prosecute a suit for the collection of taxes was regarded in Robinson v. Bierce, 102 Tenn. 428, as gross laches, depriving the state of its lien on the property.

²San Francisco v. Jones, 20 Fed. Rep. 188, 190.

³Randolph v. Bayne, 44 Cal. 366; Dougherty v. Henarie, 47 Cal. 9; Himmelman v. Carpenter, 47 Cal. 42.

⁴San Diego v. Higgins, 115 Cal. 170. See what this case says of the earlier case of Lewis v. Rothchild, 92 Cal. 625.

⁵Bristol v. Washington County, 177 U. S. 147; Redwood County v. Winona & St. P. L. Co., 40 Minn. 512; Mower County v. Crane, 51 Minn. 201; Pine County v. Lambert, 57 Minn. 203. In Minnesota the right to institute new proceedings to enforce payment of taxes on a judgment that prior proceedings were ineffectual, cannot be barred by lapse of time between the institution of the original proceedings and the determination of their invalidity: State v. Kipp, 70 Minn. 286. The limitation applicable to judgments applies in cases where prior tax judgments are to be included in a new judgment as provided for in a clearing-up statute: State v. Ward, 79 Minn. 362. See State v. Bellin, 79 Minn. 131. In State v. Sage, 75 Minn. 448, the six-year limitation of actions "on a liability created by statute" was held not to begin to run against proceedings to enforce payment of taxes until the expira-

it is considered that as the tax-lien on realty is by statute perpetual, no lapse of time should bar the remedy to enforce it, and, therefore, the six-year bar is not applicable to this statutory remedy.¹ Similar rulings have been made in South Dakota² and in Washington.³ In the latter state the period of limitation against the collection of an assessment for a street improvement begins to run only from the time a valid assessment has been made; so that, there being an invalid assessment and then a re-assessment, it runs only from the date of the latter.⁴ Where taxes are assessed for omitted years the statute of limitations does not begin to run until such taxes have become delinquent.⁵ In Nebraska an action to foreclose a tax lien is barred within five years after the time to redeem from the tax-sale has expired.⁶

In considering the remedy by suit it is to be kept in mind that it exists only by force of the statute.⁷ The statute must, therefore, be followed carefully in the proceedings,⁸ and if there are taxes for which no lien exists they must not be united in a suit to enforce a lien for others.⁹ Unless the statute permits, a lien on several pieces of land cannot be enforced against one of them alone,¹⁰ nor, without statutory authority, can the right

tion of the time allowed for the filing of the list with the clerk of the district court.

¹ *Wells County v. McHenry*, 7 N. D. 246.

² *Iowa Land Co. v. Douglas County*, 8 S. D. 491.

³ *Port Townsend v. Eisenbeis* (Wash.), 68 Pac. Rep. 1045.

⁴ *Fogg v. Foquiam* (Wash.), 63 Pac. Rep. 234.

⁵ *State v. Fullerton*, 143 Mo. 682.

⁶ *Helphrey v. Redick*, 21 Neb. 80; *Parker v. Matheson*, 21 Neb. 546; *D'Gette v. Sheldon*, 27 Neb. 829; *Alexander v. Wilcox*, 30 Neb. 793; *Warren v. Demary*, 33 Neb. 327; *Fuller v. Colfax County*, 33 Neb. 716; *Black v. Leonard*, 33 Neb. 745; *Alexander v. Shaffer*, 38 Neb. 812; *Foree v. Stubbs*, 41 Neb. 271; *Adams v. Osgood*, 42 Neb. 550; *Alexander v. Thacker*, 43 Neb. 494; *Carson v. Broady*, 56 Neb. 648; *Darr v. Wisner*

(Neb.), 88 N. W. Rep. 518; *Stevens v. Paulsen* (Neb.), 90 N. W. Rep. 211.

⁷ *People v. Latham*, 53 Cal. 386; *People v. Biggins*, 96 Ill. 481; *Caren v. Foster*, 62 Ind. 145; *Brown v. Foder*, 81 Ind. 491; *Bowen v. Striker*, 87 Ind. 317; *Montgomery v. Aydelotte*, 95 Ind. 144; *Preston v. Roberts*, 12 Bush 570; *Connecticut Mut. L. Ins. Co. v. Wood*, 115 Mich. 444; *Alexander v. Helber*, 35 Mo. 334; *Board of Educ. v. Old Dominion, etc. Co.*, 18 W. Va. 441, citing *Cooper v. Savannah*, 4 Ga. 68. See *Peet v. O'Brien*, 5 Neb. 360.

⁸ *Webb v. Bidwell*, 15 Minn. 479; *Clegg v. State*, 42 Tex. 605. See *Louisville v. Bank of Kentucky*, 3 Met. (Ky.) 148; *Jefferson City v. McCarty*, 74 Mo. 55; *Whipple's Case*, 71 Mo. 519.

⁹ *Howard v. Augusta*, 74 Me. 79.

¹⁰ *Meyer v. Burritt*, 60 Conn. 117; *Hellman v. Burritt*, 62 Conn. 438

to enforce a municipal tax be assigned by the municipality so as to enable the assignee to institute proceedings for the tax.¹ Under a statute providing that any "person" or corporation having a lien upon real property for taxes assessed thereon may enforce such a lien by an action in the nature of a mortgage foreclosure, it has been held that a county may foreclose a tax-lien.²

Taking up the case after a failure to make collection is supposed to have occurred, the first step commonly required to be taken is the making by the collector, or some proper officer, of a report or petition to the court showing that the supposed delinquency actually exists. This being the document that calls into activity an authority of the court before latent, must conform to the law in every substantial requirement, or it will fail entirely to have any efficiency for the purpose.³ The petition,

¹ Board of Educ. v. Old Dominion, etc. Co., 18 W. Va. 441. See *McInerny v. Reed*, 23 Iowa 410; *State v. Wingfield*, 59 Ga. 202. It was held in *Barkley v. Levee Com'rs*, 93 U. S. 258, that the benefit of the lien does not inure to the benefit of public creditors. In California the lien for an assessment for a public improvement is regarded merely as an incident of the demand, and it passes with an assignment thereof: *Gill v. Dunham* (Cal.), 34 Pac. Rep. 68. And in Missouri special tax-bills issued to a contractor by virtue of charter provisions are assignable, and may be sued upon by the assignee in the city's name to his use: *Kansas City v. Rice*, 89 Mo. 685. If a contractor or his assigns are alone authorized to sue, the pleadings must show that the plaintiff is one or the other: *Bays v. Lapidge*, 52 Cal. 481. As to the tax-collector's right in Connecticut to sue to enforce a lien for taxes with the amount of which he is charged, see *Meyer v. Burritt*, 60 Conn. 117; *Hart v. Tiernan*, 59 Conn. 521.

² *Lancaster County v. Trimble*, 34 Neb. 752 (which also holds that the county need not pay delinquent taxes

before foreclosing the lien therefor): *Lancaster County v. Rush*, 35 Neb. 119; *Merrill v. Ijams*, 58 Neb. 706; *Grant v. Bartholemew*, 58 Neb. 839.

³ See *Marsh v. Chestnut*, 14 Ill. 223; *Charles v. Waugh*, 35 Ill. 315; *Fox v. Tuttle*, 55 Ill. 377; *People v. Otis*, 74 Ill. 384; *Andrews v. People*, 75 Ill. 605. Filing by wrong officer of the list of delinquent taxes is not sufficient: *Quertermous v. Walls* (Ark.), 67 S. W. Rep. 1014. The facts stated in the report may be shown to be untrue, but in so far as it is to be made on the collector's information, the sources of such information cannot be inquired into: *Andrews v. People*, *supra*. Where the collector's report failed to show, as the statute required, whether the delinquent taxes were state taxes or county taxes, the judgment thereupon was void: *Morrill v. Swartz*, 39 Ill. 108. See also *Pickett v. Hartsock*, 15 Ill. 229. For want of report by sheriff of failure to make tax by distress and sale of goods, jurisdiction held not to have been obtained: *Thatcher v. Powell*, 6 Wheat. 119, following *McClung v. Ross*, 5 Wheat. 116. And see *Ex parte Thacker*, 3 Sneed 344;

or some paper to which it refers, must specifically describe the land, else no jurisdiction of the subject-matter is obtained.¹ Generally, also, it is required that the complaint or petition

Spellman v. Curtenius, 12 Ill. 409; *Fortman v. Ruggles*, 58 Ill. 207; *Schaeffer v. People*, 60 Ill. 179; *Mayo v. Ah Loy*, 32 Cal. 477. Delinquent tax-list held not prematurely filed: *Boles v. McNeil*, 66 Ark. 422. The description of lands in a delinquent list is sufficiently certain if a competent surveyor could readily locate the land therefrom: *Sholl Bros. v. People*, 194 Ill. 24. Description, in delinquent list, of lands as "part of lots 1 and 2" in a certain section, township and range, without anything to show what parts of such lots are intended, held insufficient to support a judgment for unpaid taxes: *People v. Rickert*, 159 Ill. 496. See also as to description of lands, *Knight v. Alexander*, 38 Minn. 384; *Van Loon v. Engle*, 171 Pa. St. 157. As to the requisites of the delinquent list, see, further, *California L. & T. Co. v. Weis*, 118 Cal. 489; *Smith v. Callanan*, 103 Iowa 218; *Morrison v. St. Louis, I. M. & S. R. Co.*, 96 Mo. 602. For immaterial defects which were held not to defeat affidavits to a delinquent list, see *Prout v. People*, 83 Ill. 154; *Chicago, etc. R. Co. v. People*, 83 Ill. 467. Want of proper verification cured by introducing assessment roll: *State v. Sadler*, 21 Nev. 13. In Minnesota, by statute, no defect in the affidavit verifying the list is fatal to the court's jurisdiction: *Mille Lacs County v. Morrison*, 22 Minn. 178; *Bennett v. Blatz*, 44 Minn. 56; *Cook v. Schroeder Lumber Co. (Minn.)*, 88 N. W. Rep. 971. In Michigan the verification of a delinquent tax-list was held to apply to the whole list included in two books; and were it otherwise the alleged defect would be disregarded as not prejudicial to the taxpayer; *Auditor-General v. Sparrow*, 116 Mich.

574. Under the present system in Michigan the jurisdiction is conferred by the petition for sale with proof of proper publication, and the tax-collector's failure to make a timely return does not affect the jurisdiction or avoid a lien: *Conley v. McMillan*, 120 Mich. 694. It was held in *Duff v. Neilson*, 90 Mo. 93, that a valid judgment for taxes could not be rendered if the tax-collector failed to attach to the delinquent list filed by him the statutory affidavit alleging, among other things, that due notice of the application for judgment had been given. And in *Myers v. McRay*, 114 Mo. 377, and *Rohrer v. Oder*, 124 Mo. 24, it was decided that the court acquired no jurisdiction in an action against unknown parties for the collection of taxes where the allegations in the petition as to the interest of such parties were not verified under oath.

¹ See *Doty v. Bassett*, 44 Kan. 754; *Spicer v. Wheeler*, 53 Kan. 424; *Jefferson v. Whipple*, 71 Mo. 520; *State v. Cowgill*, 81 Mo. 321; *Vaughan v. Daniels*, 98 Mo. 230; *Polk v. Mitchell*, 1 Pickle 634. Where, in all the proceedings, including the order of sale, the lands were described as in a certain county, whereas two-thirds of them were in another county, sale, at least as to such two-thirds, was void: *Williams v. Harris*, 4 Sneed 332. Description of land as "part of lot 24" held too indefinite: *Hook v. People*, 117 Ill. 632. Even though the description in an intervening petition of the property sought to be subjected to taxes is indefinite, yet if the decree sufficiently describes the property it will be assumed that the testimony warranted the description: *United States Trust Co. v. New Mexico*, 183 U. S. 535.

shall contain sufficient allegations of ownership, and of the amount due on each tract or parcel of land.¹ It has been held that a bill to enforce a tax-lien need not aver the several statutory steps necessary to the validity of the tax or assessment;² but other cases maintain the contrary.³ Formal errors in the petition are held to be immaterial if the land and taxes are correctly described, and if legal service of process is made.⁴ Other points concerning the complaint or petition in these proceedings are decided in the cases cited in the margin.⁵

The next step will usually be the giving of notice that will stand in the place of the process, which in ordinary cases brings the parties before the court.⁶ Proceedings of this nature are not usually proceedings against parties,⁷ nor, in the case

¹See *Mix v. People*, 122 Ill. 641; *Kentucky Central R. Co. v. Pendleton County* (Ky.), 2 S. W. Rep. 176; *Polk v. Mitchell*, 1 Pickle 634; *Whatcom County v. Fairhaven L. Co.*, 7 Wash. 101. Where the complaint, in a proceeding to sell, alleged delinquency in the tax for a certain year only, a sale on a decree including unpaid taxes for other years was held void: *Elsev v. Falconer*, 56 Ark. 419.

²See *Parker v. Jacksonville*, 37 Fla. 342; *State v. Rau*, 93 Mo. 126.

³*Louisville v. Bank of Kentucky*, 3 Met. (Ky.) 148; *Kentucky Central R. Co. v. Commonwealth*, 92 Ky. 64; *Louisville v. Louisville Gas Co.* (Ky.), 22 S. W. Rep. 550; *Swenson v. Greenland*, 4 N. D. 532.

⁴*Pritchard v. Madren*, 24 Kan. 486. The fact that a petition in proceedings to obtain a decree for taxes was irregular, in that some of the taxes were grouped under no definite description, does not avoid the decree: *Church v. Nester*, 126 Mich. 547.

⁵See *Bays v. Lapidge*, 52 Cal. 481; *Belser v. Allman* (Cal.), 66 Pac. Rep. 492; *Johnson v. State*, 116 Ind. 374; *Chaney v. State*, 118 Ind. 494; *Ross v. State*, 119 Ind. 90; *Wray v. Fry* (Ind.), 62 N. E. Rep. 1004; *State v. Rau*, 93 Mo. 126; *St. Joseph v. Kan-*

sas City, St. J. & C. B. R. Co., 118 Mo. 671; *Dorr v. Berquist* (Neb.), 89 N. W. Rep. 256; *Iodence v. Peters* (Neb.), 89 N. W. Rep. 1041.

⁶In tax-suits in Missouri notices and process are required to be served as in ordinary civil cases involving real estate: *Cruzen v. Stephens*, 123 Mo. 337.

⁷*Atlantic & P. R. Co. v. Yavapai County* (Ariz.), 21 Pac. Rep. 768; *Park's v. Miller*, 48 Ill. 360; *Schaeffer v. People*, 60 Ill. 179; *McQuade v. Jaffray*, 47 Minn. 326. And see *Black v. Penfield*, 1 Ark. 472; *Senichka v. Lowe*, 74 Ill. 274; *People v. Otis*, 74 Ill. 384. It was held in a suit brought under the Missouri statute to enforce the state's lien for taxes, that a stranger could not, by a motion to quash, intervene and contest the title to the land: *State v. Clymer*, 81 Mo. 122. Statutes providing for foreclosure of tax-liens by proceedings *in rem* to which the land alone is made a party, and for cutting out all pre-existing rights or liens by sales under decree therein, sustained as not depriving persons of property without due process of law: *Leigh v. Green* (Neb.), 90 N. W. Rep. 255. As to when an owner of land is "not known," within the terms of a statute providing that where the owner of the land is not

of lands or interests in lands belonging to persons unknown, can they be. They are proceedings which have regard to the land itself rather than to the owners of the land, and if the owners are named in the proceedings and personal notice is provided for, it is rather from tenderness to their interests, and in order to make sure that the opportunity for a hearing is not lost to them, than from any necessity that the case shall assume that form. In some states, indeed, the owners of the land are required to be designated in the proceedings,¹ and it is held

known an action to foreclose a tax-lien may be brought against the land itself, see *Ibid.* In Nebraska, on the foreclosure of a tax-lien, if the parties affected are not before the court their remedy is an action to redeem, and if the court had jurisdiction the decree cannot be treated as void: *Merriam v. Goodlett*, 36 Neb. 384.

¹Under the Missouri statute the owners of the land must be made parties to the proceedings to enforce a lien. By the "owner" is meant the record owner: *State v. Sack*, 79 Mo. 661; *Allen v. Ray*, 96 Mo. 542. See *Vance v. Corrigan*, 79 Mo. 94. To what records resort may be made to ascertain apparent owner, see *Payne v. Lott*, 90 Mo. 676. Record destroyed by fire, secondary evidence: *Crane v. Dameron*, 98 Mo. 567. Persons claiming under a deed from a mere trespasser are not record owners within the Missouri statute: *Kansas City & A. R. Co. v. Smith*, 156 Mo. 808. Nor is one who is entitled to collector's deeds for taxes, but who has not procured them and had them registered when suit is commenced for delinquent taxes, an "owner" of the land: *Hilton v. Smith*, 134 Mo. 499. The trustee in a deed of trust is an "owner," and so a necessary party to a suit to enforce a lien for taxes; but omission to name him as a party does not render the tax-sale wholly void: *Gitchell v. Kreedler*, 84 Mo. 472. See *Cowell v. Gray*, 85 Mo. 169. Beneficiaries named in a trust

deed, or their representatives, if they be dead, must be made parties; but the sale will not be avoided if they are not, as they may redeem and foreclose: *Allen v. McCabe*, 93 Mo. 138. See *Stafford v. Fizer*, 82 Mo. 393; *Cowell v. Gray*, 85 Mo. 169. The assignee of a note secured by a deed of trust is also a necessary party to a suit to enforce a lien against the land embraced in a trust-deed: *Boatmen's Savings Bank v. Greive*, 84 Mo. 477. When the summons is against a bank-president individually, a judgment against the bank is of no effect: *Blodgett v. Schaffer*, 94 Mo. 652. A material error in naming the owner will render the judgment void: *Skelton v. Sackett*, 91 Mo. 377; *Whelen v. Weaver*, 93 Mo. 430; *Troyer v. Wood*, 96 Mo. 478; *Mosely v. Reily*, 126 Mo. 124; *Turner v. Gregory*, 151 Mo. 100. *Contra* in Minnesota: *McQuade v. Jaffray*, 47 Minn. 326. It is sufficient to designate the owner by the name which the recorded deeds disclose: *Elting v. Gould*, 96 Mo. 535. In Nebraska the owner of the equity of redemption is a necessary party in a suit to foreclose a tax lien: *Alexander v. Thacker*, 30 Neb. 614. Mortgagees have been held not to be necessary parties in a suit to foreclose a lien for taxes against a homestead in Illinois: *People v. Weber*, 164 Ill. 412. Nor, in Texas, is the wife a necessary party in foreclosing a lien for taxes on her husband's home-

that the interests of persons not made parties are not affected,¹ so that *cestuis que trustent*, mortgagees, life-tenants, and remainder-men are not bound by the judgment unless they have been impleaded.² Personal service of process upon residents is also required in some of the states.³ But, as in all

stead: *San Antonio v. Berry*, 92 Tex. 319. In Mississippi a railroad company which owned a majority of stock bonds in another company was held a proper party in a suit to foreclose a tax-lien on the property of the latter: *Yazoo & M. V. R. Co. v. Adams*, 77 Miss. 764. In California, a judgment in a proceeding not taken against "all owners and claimants" and by service on the land, as the statute required, was held void: *Mayo v. Ah Loy*, 32 Cal. 477. In Michigan all owners of land described in the petition are parties whether named or not, and whether brought in by personal service or by publication: *Benedict v. Auditor-General*, 104 Mich. 269.

¹*State v. Clymer*, 81 Mo. 122; *Graves v. Ewart*, 99 Mo. 13; *Blevins v. Smith*, 104 Mo. 583. A judgment in a tax-suit brought against one who is dead at the time is void as to his heirs: *Crosley v. Hutton*, 98 Mo. 196. If a decedent's land is sold for taxes without making one of his heirs a party to the action, such heir may, in an action to recover the whole tract, recover her individual share: *Walcott v. Hand*, 122 Mo. 621. In a special tax-bill suit where the record owner, a non-resident, was dead, and the heirs, the owners, were not made parties, the sale did not pass title: *Perkinson v. Meredith*, 158 Mo. 457. As to the effect, in California, of failure to make either personal representatives or heirs of a decedent parties to an action to foreclose the lien of a street assessment against land of the estate, see *Wood v. Curran*, 99 Cal. 137. In Indiana a judgment foreclosing a tax-lien against

the person to whom the land was erroneously assessed, rendered in an action to which the owner was not a party and of which she had no knowledge, is not binding upon her: *Grigsby v. Akin*, 128 Ind. 591. And in that state the foreclosure of a tax-lien upon land assessed for a ditch does not extinguish the lien of such assessment where the persons beneficially interested in the land are not made parties: *McCullum v. Uhl*, 128 Ind. 304.

²*Corrigan v. Bell*, 73 Mo. 53; *Stafford v. Fizer*, 82 Mo. 393; *Evans v. Robberson*, 92 Mo. 192; *Powell v. Greenstreet*, 95 Mo. 14; *Berlien v. Bieler*, 96 Mo. 491; *Allen v. De Groodt*, 98 Mo. 159; *Graves v. Ewart*, 99 Mo. 13; *Blevins v. Smith*, 104 Mo. 583. See *Mason v. Gitchell*, 97 Mo. 134, following *Gitchell v. Messmer*, 87 Mo. 131. It seems, however, that as to those actually made defendants the judgment is not void: *Williams v. Hudson*, 93 Mo. 524; *Allen v. De Groodt*, 98 Mo. 159; *Stevenson v. Black* (Mo.), 68 S. W. Rep. 909; *Hogan v. Smith*, 11 Mo. App. 314. Effect, in Tennessee, of decree to enforce lien of taxes assessed against tenant in dower: See *State v. Campbell* (Tenn.), 41 S. W. Rep. 937.

³As to the necessity, under the former statutory provision in Michigan, of personal service of subpoena upon persons owning, or interested in, the land, see *Fowler v. Campbell*, 100 Mich. 398; *Taylor v. Deveau*, 100 Mich. 581; *Coyle v. O'Connor*, 121 Mich. 596; *Nowlen v. Hall* (Mich.), 87 N. W. Rep. 222. Personal service upon owner who bought the land after the assessment was held un-

other cases of proceedings *in rem*, if the law makes provision for publication of notice in a form and manner reasonably calculated to bring the proceedings to the knowledge of the parties who use ordinary diligence in looking after their interests in the lands, it is all that can be required.¹ Such notice is generally to be based upon an order of publication² in some newspaper³ perhaps officially designated,⁴ and in most juris-

necessary even though his deed was recorded before the petition was filed: *Wiley's Petition*, 89 Mich. 58. So such service was unnecessary in the case of a resident owner of land assessed as unknown or non-resident: *Tromble v. Hoffman* (Mich.), 90 N. W. Rep. 694.

¹ Notice by publication is sufficient even as to non-resident owners, if the statute prescribes it: *New Orleans v. Cordeviole*, 10 La. An. 732; *Drainage Co. Cases*, 11 La. An. 338; *In re Lake*, 40 La. An. 142; *In re Douglas*, 41 La. An. 765; *Henderson v. Ellerman*, 47 La. An. 306; *Cuttle v. Brockway*, 32 Pa. St. 45. This was one of the points of contention in the *State Tax-Law Cases*, 54 Mich. 350, in which the court was equally divided; but the doctrine of the text has come to be accepted in Michigan as elsewhere. See *Auditor-General v. Sloman*, 84 Mich. 118. It was held in *Thatcher v. Powell*, 6 Wheat. 119, that the clerk's failure to make publication of the list was fatal to the proceedings. See, also, *Dick v. Foraker*, 155 U. S. 404; *Gregory v. Bartlett*, 55 Ark. 33; *St. Louis & S. F. R. Co. v. Holton-Warren Lumber Co.*, 61 Ark. 50; *Martin v. Hawkins*, 62 Ark. 421; *Spellman v. Curtenius*, 12 Ill. 409; *Charles v. Waugh*, 35 Ill. 315; *McKee v. Champaign County*, 53 Ill. 477; *Fortman v. Ruggles*, 58 Ill. 207; *McGahan v. Case*, 6 Iowa 331; *Burns v. Ford*, 124 Mich. 274; *Abbott v. Lindenbower*, 42 Mo. 162. In *Emmons County v. Thompson*, 9 N. D. 598, the fact of publication of the delinquent tax list, coupled with the filing of the affidavit of publica-

tion, was held to confer authority to enter judgment by default. In *Santa Barbara v. Eldred*, 108 Cal. 294, it was held that one sued for a tax could not object that the delinquent list was not published as required by law, where the assessment was valid.

² As to the affidavit for an order of publication, see *Coombs v. Crabtree*, 105 Mo. 292. Order essential to jurisdiction: *Gregory v. Bartlett*, 55 Ark. 30. Failure to make it not cured after sale by *nunc pro tunc* entry: *Ibid.* Description of land, when unnecessary: *Goldsmith v. Thompson*, 87 Mo. 233; *Milner v. Shipley*, 94 Mo. 106; *Allen v. Ray*, 96 Mo. 542; *Stewart v. Allison*, 150 Mo. 343. Description of the land as the "S hf" of a given section, held sufficient: *Allen v. Ray*, 96 Mo. 542. Non-resident owner must be named in order; "Wheler" for "Whelen," "Miller" for "Millen," insufficient: *Whelen v. Weaver*, 93 Mo. 430; *Chamberlain v. Blodgett*, 96 Mo. 482.

³ Publication required in newspaper "published in this state," order need not be shown to have been published in newspaper circulated in county: *Coombs v. Crabtree*, 105 Mo. 292. Publication in newspaper printed in foreign language, not valid: *Visscher v. Ottawa Circuit Judge*, 116 Mich. 666; *State v. Chamberlain*, 99 Wis. 503. See, however, *Kernitz v. Long Island City*, 50 Hun 428, 3 N. Y. Supp. 144. Publication in supplement of newspaper held sufficient: *Watts v. Bublitz*, 99 Mich. 586; *Mann v. Carson*, 120 Mich. 631; *Wilkin v. Keith*, 121 Mich. 66.

⁴ As to the designation of the news-

dictions is required to accompany the list of delinquent taxes,¹ with a description of the lands affected,² the names of the owners,³ and the amount of tax charged against each parcel.⁴ The

paper in which publication is to be made, see *Watts v. Bubltz*, 99 Mich. 586; *Waldron v. Auditor-General*, 109 Mich. 231; *Wilkins v. Keith*, 121 Mich. 66; *Hussell v. St. Paul, M. & M. R. Co.*, 36 Minn. 366; *Brown v. Corbin*, 40 Minn. 508; *Merriam v. Knight*, 43 Minn. 593; *Godfrey v. Valentine*, 45 Minn. 502; *Reimer v. Newell*, 47 Minn. 237; *Kipp v. Dawson*, 59 Minn. 82; *Cass County v. Security Imp. Co.*, 7 N. D. 528; *Emmons v. First Nat. Bank's Lands*, 9 N. D. 583; *Board of Com'rs v. Chaplin*, 5 Wyo. 74.

¹ Under a statute requiring notice to be "attached" to the list of taxes delinquent, it is not whether it precedes or follows the list if it be attached to it when published: *Chouteau v. Hunt*, 44 Minn. 173. The notice is bad if it omits to state that judgment will be applied for against the lands or lots named in the delinquent list, or if there is a substantial variance between the warrant as described in it and the one described in the judgment record: *Gage v. People*, 188 Ill. 92. The auditor's affidavit filed with the list of delinquent lands is not part of the notice and need not be filed with it: *Chouteau v. Hunt*, *supra*.

² *Feller v. Clark*, 36 Minn. 338; *Smith v. Kipp*, 49 Minn. 119; *Leigh v. Green* (Neb.), 90 N. W. Rep. 255; *Lee v. Crawford* (N. D.), 88 N. W. 97. As to sufficiency of description of the land in the delinquent tax-list as published, see *Kipp v. Fernhold*, 37 Minn. 132; *Knight v. Alexander*, 38 Minn. 384; *Olivier v. Gurney*, 43 Minn. 69; *McQuade v. Jaffray*, 47 Minn. 326; *Lee v. Crawford* (N. D.), 88 N. W. Rep. 97; *Asper v. Moon* (Utah), 67 Pac. Rep. 409. A collector's notice of application for judgment was held void for uncertainty because describ-

ing the land thus: "Except 12.64 acres in southeast corner of subplot 1, lot 1, in north section Robinson reserve": *Pickering v. Lomax*, 120 Ill. 289.

³ It was held in *McChesney v. People*, 178 Ill. 542, that the omission of the owner's name was "a plain disregard of duty." Here the name in the delinquent list was "A. B. McChesney," whereas in the notice published it was "Chesney." Order of publication to "Q. R. Noland" held insufficient to give jurisdiction over "Quinces R. Noland": *Skelton v. Sackett*, 91 Mo. 377. So with order addressed to one "Wheler," the true name being "Whelen": *Whelen v. Weaver*, 93 Mo. 430. Description of owner as "Vaughn Turner," whereas the record name was "Singleton V. Turner," held bad even though the person was commonly known as "Vaughn Turner": *Turner v. Gregory*, 151 Mo. 100. In Minnesota an erroneous statement of the owner's name in the published list of delinquent taxes will not avoid the tax-judgment where the land itself has been correctly described; the statutory requirement being directory merely: *McQuade v. Jaffray*, 47 Minn. 326. A publication of a delinquent tax-list in which property owned jointly was stated as owned by one of the joint owners "and others," is insufficient: *Asper v. Moon* (Utah), 67 Pac. Rep. 409.

⁴ The same strictness as to definiteness and certainty is not required in the statement of the amount of tax against a tract of land in the published list (which is merely notice to the land-owner) as is required in a judgment which is the final determination of the law as to the amount to be enforced against the land: Col-

provisions of the statute concerning the manner of the notice by publication must be complied with substantially,¹ and the proof of publication must conform to the statutory requirements.²

Defects in obtaining jurisdiction to enforce against real estate the collection of delinquent taxes are waived where the owner appears and objects to the assessment.³

lins v. Welch, 38 Minn. 62. Statute requiring amount of taxes to be stated opposite each description does not require them to be stated in detail year by year: *Whitney v. Wegler*, 54 Minn. 235. Sale under notice describing the lands and stating the "amount sold for" is of no validity: *Mather v. Darst*, 13 S. D. 75. As to the omission of decimal or dollar mark, see *Collins v. Welch*, 38 Minn. 62; *Bonham v. Weymouth*, 39 Minn. 92; *Chouteau v. Hunt*, 44 Minn. 173.

¹ *Yaggy v. Chicago*, 194 Ill. 88; *Ledyard v. Auditor-General*, 121 Mich. 56. See, as to the form and sufficiency of the publication, *St. Louis & S. F. R. Co. v. Holton-Warren Lumber Co.*, 61 Ark. 50; *Martin v. Hawkins*, 62 Ark. 421; *McCauley v. People*, 87 Ill. 123; *Eldridge v. Richmond*, 120 Mich. 586; *McFadden v. Brady*, 120 Mich. 699; *Burns v. Ford*, 124 Mich. 224; *Coffin v. Estes*, 32 Minn. 367; *McQuade v. Jaffray*, 47 Minn. 336. Notice requiring all persons interested to file their answers, stating objections, etc., within ten instead of twenty days, as required by statute, avoids certificate of sale: *Stearns County v. Smith*, 29 Minn. 131; *West v. St. Paul & N. P. R. Co.*, 40 Minn. 189. Omission to file notice or have it approved by the court, held not to affect jurisdiction: *English v. Woodman*, 40 Kan. 412.

² See, as to proof of publication, *Martin v. Allard*, 55 Ark. 218; *Gallagher v. Johnson*, 65 Ark. 90; *Taylor v. State*, 65 Ark. 595; *Porter v. Dooley*, 66 Ark. 1; *West v. State (Ark.)*,

61 S. W. Rep. 918; *Bass v. People*, 159 Ill. 207; *McChesney v. Kochersperger*, 174 Ill. 46; *Stout v. Coates*, 35 Kan. 382; *Benedict v. Auditor-General*, 104 Mich. 269; *Muirhead v. Sands*, 111 Mich. 487; *Wynkoop v. Grand Traverse Circuit Judge*, 113 Mich. 381; *Featherly v. Hoffman*, 117 Mich. 42; *Garner v. Wallace*, 118 Mich. 387; *Spaulding v. O'Connor*, 119 Mich. 45; *Brooks v. Auditor-General*, 120 Mich. 631; *McFadden v. Brady*, 120 Mich. 699; *Nester v. Church*, 121 Mich. 81; *Hoffman v. Pack*, 123 Mich. 74; *Church v. Nester*, 126 Mich. 547; *Irwin v. Pierro*, 44 Minn. 490.

³ *Cairo, V. & C. R. Co. v. Mathews*, 152 Ill. 153; *Nicholes v. People*, 165 Ill. 502; *Illinois Central R. Co. v. People*, 170 Ill. 224; *McChesney v. People*, 178 Ill. 542; *Tromble v. Hoffman (Mich.)*, 90 N. W. Rep. 694. See *Atlantic & P. R. Co. v. Yavapai County (Ariz.)*, 21 Pac. Rep. 768. And an appearance by counsel to object to certain taxes precludes one from denying on collateral attack the validity of the judgment rendered against him for taxes, even as to items of tax to which he did not object: *Neff v. Smyth*, 111 Ill. 100. One who sues to set aside a tax-deed need not show affirmatively that he did not appear and object to the rendition of judgment before he can attack the validity of such judgment: *Gage v. Nichols*, 135 Ill. 128. Nor will one who seeks to cancel sales under a judgment for an illegal tax be presumed to have appeared or objected in the county court because

Among the admissible defenses in suits for the enforcement of taxes against realty are: want of authority to levy the tax;¹ that the land is not within the jurisdiction,² or is exempt from taxation;³ and that the tax has been paid.⁴ It is a defense, *pro tanto*, that a part of the tax has not been remitted as required by certain statutes.⁵ That the special facts authorizing the insertion of taxes for past years in the list did not exist may be shown,⁶ and so may any omission to the taxpayer's prejudice in the proceedings prior to filing the list.⁷ It has been held that a statute which provides that "if a party interposes as a defense an omission of any of the things provided by law in relation to the assessment or levy of a tax, or of anything required by any officer to be done prior to filing the list with the clerk, the burden is on him to show that such omission has resulted in prejudice to him, and that the taxes have been partially, unfairly, or unequally assessed," does not define and limit the defenses which may be made — does not restrict the right of defense to cases in which there has been some omission of the statutory requirements.⁸ Excessive valuation is not a defense unless it is fraudulent,⁹ nor will the fact that some property in the same jurisdiction

he does not expressly allege that he did not: *Gage v. Goudy*, 141 Ill. 215. Sufficiency of showing that no appearance was entered or resistance made: *Gage v. Lyons*, 138 Ill. 590.

¹ *Commissioners v. Nettleton*, 22 Minn. 356; *Olmsted v. Barber*, 31 Minn. 256.

² *Keokuk & H. Bridge Co. v. People*, 161 Ill. 132, which holds that the assessment of a bridge over a river between two states may, on an application for judgment in an action to collect the tax, be attacked on the ground that a part of the bridge without the state was included within the assessment. A judgment enforcing a tax-lien, rendered by a county court within whose jurisdiction the land does not lie, is void: *State v. Baker*, 129 Mo. 482.

³ *Chisago County v. St. Paul & D. R. Co.*, 27 Minn. 109.

⁴ *Chisago County v. St. Paul & D.*

R. Co., 27 Minn. 109. See *ante*, pp. 810, 811.

⁵ *Commissioners v. Jessup*, 22 Minn. 552.

⁶ *Olmsted v. Barber*, 31 Minn. 256.

⁷ *Olmsted v. Barber*, 31 Minn. 256.

⁸ *Redwood County v. Winona & St. P. L. Co.*, 40 Minn. 512; *Otter Tail County v. Batchelder*, 47 Minn. 512.

The latter of these cases holds that for the purpose of reducing the tax charged upon the land it may be shown that the statutory requirement of equality in the assessment had been intentionally disregarded, or that by reason of some obvious mistake there had been no real assessment upon any rule of equality. In *State v. Deering & Co.*, 56 Minn. 1, it was held that a defendant might show errors in his assessment, and that the burden is on him to show wherein he is prejudiced.

⁹ *Spencer v. People*, 68 Ill. 510. And

was omitted from the assessment be ground for defeating the judgment.¹ It was held no objection to the collection of the tax that the property now owned by a taxpayer was not owned by him when the tax was levied; that it was not on the tax-duplicate, and that he had no knowledge of the tax-lien when he bought the property.² In these proceedings matters cannot be set up by way of defense which might and should have been interposed before.³ Certain defenses may be waived by failing to present them in the answer.⁴ And questions which go only to the manner of the assessment and levy, and mere irregularities and informalities, will not be considered.⁵

Proof of the amount and validity of the taxes sought to be enforced against land is facilitated nearly everywhere by statutory provisions. As is said in one case: "It is the settled doctrine . . . that any one objecting to the enforcement of a tax assumes the burden of showing its invalidity. The presumption is that the tax is just; that all officers who have had any official connection with it have properly discharged their duties."⁶ Sometimes the effect of a *prima facie* case is

see *ante*, pp. 385-387. See, also, *Henderson Bridge Co. v. Henderson*, 105 Ky. 32, 38. In *State v. Board of Public Works*, 27 Minn. 442, in regard to special assessments under a city charter, it is said that "even though no intentional fraud be proved, it may be shown in defense that the error in the assessment was so gross that it cannot be accounted for upon any ground of mere misjudgment of value, but must have resulted, if not from fraud, from a 'demonstrable mistake of fact.'" In *State v. Western Union Tel. Co. (Mo.)*, 65 S. W. Rep. 775, a defense to an action at law for the collection of taxes was held to show merely a difference of opinion as to valuation, which a court of law could not determine.

¹ *Spencer v. People*, 68 Ill. 510, citing *Merritt v. Farris*, 22 Ill. 303; *Dunham v. Chicago*, 55 Ill. 357; *State v. Lakeside Land Co.*, 71 Minn. 283. And see *ante*, pp. 383-385.

² *Pittsburgh, C. C. & St. L. R. Co. v. Harden*, 137 Ind. 486. Where the

judgment on a special tax-bill for street improvements can be levied only on the land against which the special tax is a charge, it is not a defense to the action that defendant does not own the land, or that ejectment is pending for the land: *Keith v. Bingham*, 100 Mo. 300.

³ *Riddle v. Messer*, 84 Ala. 236; *Mix v. People*, 116 Ill. 265. As, for example, that the land was disproportionately and excessively valued for taxation, or that an item of tax levied was void: *Mix v. People*, *supra*.

⁴ See *State v. Baldwin*, 62 Minn. 518; *Medland v. Connell*, 57 Neb. 10.

⁵ *Roads v. Estabrook*, 35 Neb. 297. This was an equitable proceeding to foreclose a tax-lien.

⁶ *Peoria, D. & E. R. Co. v. People*, 116 Ill. 401; *People v. Keener*, 194 Ill. 16. Where a lien for general revenue is sought to be enforced, the presumption is that the law in reference to the levy, assessment, and sale has been complied with: *Leavitt*

given to the tax-collector's sworn report of delinquent taxes, together with proof of publication thereof and of notice of the application for judgment, it being provided that judgment shall be entered thereon unless good cause is shown to the contrary.¹ Sometimes, also, it is provided that a properly certified tax-bill shall be *prima facie* evidence that the amount thereof is correct.² Under the statutes of Nebraska, in an action to foreclose

v. Bell, 55 Neb. 57. An assessment and levy for general revenue are always evidence of a valid tax: Adams v. Osgood, 60 Neb. 779. Assessment roll as *prima facie* evidence: San Gabriel Valley, etc. Co. v. Witmer Bros. Co., 96 Cal. 623. In a city's action to enforce a lien for taxes, proof that the assessment roll has been regularly certified is sufficient, *prima facie*, to authorize a decree of foreclosure: Olympia v. Stevens, 15 Wash. 601. The burden of proof is on the person who attacks a tax-record: Boyce v. Auditor-General, 90 Mich. 314. See Farrington v. Investment Co., 1 N. D. 102; Shuttuck v. Smith, 6 N. D. 56. Presumption in favor of special tax; burden on owner of showing illegality: Auditor-General v. Maier, 95 Mich. 127. See, however, Smith v. Omaha, 49 Neb. 883; Equitable Trust Co. v. O'Brien, 55 Neb. 735; Leavitt v. Bell, *supra*.

¹See cases cited *ante*, pp. 827, 828. *Prima facie* case in action to enforce special assessment: Fanning v. Bohme, 76 Cal. 149; Fanning v. Leviston, 93 Cal. 187; McDonald v. Conniff, 99 Cal. 391; Clark v. Meade, 102 Cal. 519; Dowling v. Conniff, 103 Cal. 78; Belser v. Allman (Cal.), 66 Pac. Rep. 492; Blanchard v. Ladd (Cal.), 67 Pac. Rep. 130. As to what is admissible to show the amount of tax due, see, also, Mix v. People, 122 Ill. 641; McKinney v. State, 117 Ind. 26.

²State v. Maloney, 113 Mo. 367; State v. Cunningham, 153 Mo. 642. In an action on a special tax-bill for

constructing a sewer, such bill is *prima facie* evidence that the person named therein is the owner of the property sought to be charged, and that the property is subject to the charge: Heman v. Payne, 27 Mo. App. 481. The tax-bill, to be *prima facie* evidence in an action to recover a special tax, must be definite, and must show on its face that it was issued under some competent authority and for some specific purpose: Linneus v. Locke, 25 Mo. App. 407. But it is not necessary that special tax-bills shall show that every prerequisite step necessary to their validity has been taken: Keith v. Bingham, 100 Mo. 300. The *prima facie* case made by offering in evidence the tax-bill is overcome by proof that the tax-bill has for its foundation an uncorrected and uncertified tax-list: State v. Scott, 96 Mo. 72; see State v. Hurt, 113 Mo. 90. As the statute specially providing for the collection of taxes upon railroad property contains no provision as to tax-bills, such bills certified from the general tax-books of the county are not admissible in evidence in actions against railroad companies for back taxes on land: State v. Davis, 131 Mo. 457. But if so admitted the error is harmless where the liability for the tax and its amount are properly proved: State v. Hannibal & St. J. R. Co., 113 Mo. 297. Though *prima facie* evidence of its validity, a tax-bill is not conclusive evidence; and hence a person sued thereon may show that

a tax-sale certificate and to recover prior and subsequent taxes and assessments paid by the holder of the certificate, such certificate, and the receipts for such taxes and assessments, are *prima facie* evidence of the validity of the taxes which they represent.¹

Judgment will be void if taken before the time limited for the voluntary payment of the taxes has expired.² It will also be void if applied for and obtained at a term different from that at which the statute requires the application to be made.³ And if the statutory time within which the property owner may make objections is taken away or shortened by the action of the court, the proceedings are void.⁴

The judgment or decree in suits of this kind is, as a rule, strictly *in rem* and not *in personam*,⁵ although in some states

it is not based upon a valid assessment, and may attack for fraud the judgment of the county board of equalization: *State v. Cunningham*, 153 Mo. 642. And in an action on a tax-bill against a bank it was error to exclude evidence that the tax for that year had been paid before the suit was begun, and that it was stock which was assessed: *State v. Merchants' Bank*, 160 Mo. 640. It appearing, in such action, that the assessment should have been against the bank, the *prima facie* case made by the bill was overcome: *Ibid*.

¹ *Dorr v. Berquist* (Neb.), 89 N. W. Rep. 256; *Ure v. Reichenberg* (Neb.), 89 N. W. Rep. 414; *Ryan v. West* (Neb.), 89 N. W. Rep. 416; *Concordia L. & T. Co. v. Van Camp* (Neb.), 89 N. W. Rep. 744; *Starr v. Voss* (Neb.), 89 N. W. Rep. 750.

² *Williams v. Gleason*, 5 Iowa 284. For the same principle, see *Pickett v. Hartsock*, 15 Ill. 279.

³ *Brown v. Hoyle*, 30 Ill. 119; *Kinney v. Forsythe*, 96 Mo. 414.

⁴ *Ledyard v. Auditor-General*, 121 Mich. 56; *Roberts v. Loxley*, 121 Mich. 63; *McGinley v. Calumet, etc. Co.*, 121 Mich. 88; *Wait v. McMillan*, 121 Mich. 95; *Miller v. Brown*, 122

Mich. 147; *Aztec Copper Co. v. Auditor-General* (Mich.), 87 N. W. Rep. 895; *Tromble v. Hoffman* (Mich.), 90 N. W. Rep. 694. See *Peninsular Savings Bank v. Wood*, 118 Mich. 87. Decree for sale of land for delinquent taxes held not premature: *Gates v. Johnson*, 121 Mich. 663; *Brown v. Houghton, etc. Mining Co.*, 123 Mich. 117; *Brown v. Napper*, 125 Mich. 117. It is not ground for setting aside a decree of sale that there was not enough time between publication and hearing to permit a non-resident owner to reach the place of trial from the place of his residence: *Waldron v. Auditor-General*, 109 Mich. 231. Jurisdiction to render judgment is not lost by taking time for hearing and considering objections to judgment against certain property in the delinquent list until the time fixed for the sale of the other property in such list has expired: *Maish v. Arizona*, 164 U. S. 193.

⁵ *McQuade v. Jaffray*, 47 Minn. 326; *Milner v. Shipley*, 94 Mo. 106; *Blevins v. Smith*, 104 Mo. 583; *Neenan v. St. Joseph*, 126 Mo. 89; *State v. Snyder*, 139 Mo. 549; *Grant v. Bartholemew*, 57 Neb. 673, 58 Neb. 839; *Carman v. Harris*, 61 Neb. 635; *Toy v.*

interests appearing of record will not be affected unless their owners are impleaded.¹ Statutory requirements must, of course, be complied with;² the property should be described with such

McHugh (Neb.), 87 N. W. Rep. 1059; Philadelphia Mortg. & T. Co. v. Omaha (Neb.), 88 N. W. Rep. 523; Whatcom County v. Fairhaven L. Co., 7 Wash. 101. See *In re Steen's Estate*, 175 Pa. St. 299. A deficiency judgment entered against the landowner in a suit to foreclose a tax-lien is void: *Kelley v. Wehn* (Neb.), 88 N. W. Rep. 682. In Indiana a personal judgment should not be entered in an action to foreclose the lien of an assessment on property for a street improvement: *Leeds v. DeFrees* (Ind.), 61 N. E. Rep. 930. So in Kentucky in a suit to collect an assessment for street improvements: *Meyer v. Covington*, 103 Ky. 546; *Barker v. Southern Construc. Co.* (Ky.), 47 N. W. Rep. 608. In Missouri the state is not entitled to a general or personal judgment against one for taxes on real estate. It is entitled to a special judgment which may be made a specific lien on the real estate described in the judgment; but a levy cannot be made upon any property of the defendant for the payment of such judgment, except upon the land against which the tax was originally laid: *State v. Snyder*, 139 Mo. 549. City charter construed as providing only for a lien on the property liable for the improvements in an action to collect an invalid assessment, and not for a personal judgment: *Nottage v. Portland*, 35 Or. 539. In Texas a city charter authorizing the city to sue for special taxes due to it has been held to entitle the city to a personal judgment therefor against the property-owner in addition to the right of subjecting the property to a foreclosure of the lien therefor: *San Antonio v. Berry*, 92 Tex. 319.

¹See *ante*, p. 885. Title of one who had not procured and recorded tax-deeds to which he was entitled held cut off by judgment though he was not party to suit: *Hilton v. Smith*, 134 Mo. 499.

²*McChesney v. Kochersperger*, 174 Ill. 46. This case holds that the judgment is invalid if it is a mere order of sale. In Arkansas, where a bill is filed to enforce the state's lien for taxes on lands that have not been assessed, the decree should show, by the assessor's return, the valuation placed on each tract, and the taxes extended thereon: *St. Louis, I. M. & S. R. v. State*, 47 Ark. 323. As to the requisites, under the Missouri statute, of a judgment against the defendant in an action to collect delinquent taxes, see *Allen v. McCabe*, 93 Mo. 138; *Kinney v. Forsythe*, 96 Mo. 414; *State v. Hunter*, 98 Mo. 386. In Alabama a decree of sale made in a proceeding before a probate judge must show the existence of the facts on which the jurisdiction is by statute based: *Wartensleben v. Haithcock*, 80 Ala. 565. In the same state a decree of sale is defective if it fails to recite that the statutory notice was given that the assessment had been made against an unknown owner, and to state the amount of costs: *Smith v. Cox*, 115 Ala. 503. As to the necessity of filling blanks and entering judgment against each description, see *German American Bank v. White*, 38 Minn. 471. Omission of formal recitals held not to invalidate judgment: *Kipp v. Collins*, 33 Minn. 394. Entries in tax-judgment book held to be so continuous as to constitute one judgment so that clerk's signature on last page related to every preceding page

certainly as to enable the officer to execute the mandate of the court;¹ and the particular amount charged against each parcel should be entered.² A decree against an owner for the aggregate of the separate demands on different parcels owned by him is erroneous.³ In California, when lands are assessed as

in the book: *Somerville v. Thrift*, 69 Minn. 474. As to countersigning the decree, see *Mersereau v. Miller*, 112 Mich. 103. Judgment held valid though not dated: *Security Ins. Co. v. Buckler*, 72 Minn. 251. In entering judgment by default on a delinquent tax-list an order of court is not required, as the clerk acts in a ministerial capacity: *Emmons County v. Thompson*, 9 N. D. 598.

¹ See *Meyer v. Covington*, 103 Ky. 546; *Gribble v. Livermore*, 72 Minn. 517; *Connecticut Mut. L. Ins. Co. v. Ingarson*, 75 Minn. 429; *Fagan v. Huntress, etc. Lumber Co.*, 80 Minn. 441; *Kinney v. Forsyth*, 96 Mo. 414. As to sufficiency of the description, see, also, *Little Rock & F. S. R. Co. v. Huggins*, 64 Ark. 432; *Meyer v. Covington*, *supra*; *Keith v. Hayden*, 26 Minn. 212; *Chouteau v. Hunt*, 44 Minn. 173; *Kern v. Clarke*, 59 Minn. 70; *Cook v. Schroeder Lumber Co.* (Minn.), 88 N. W. Rep. 971. Under the Minnesota statute a judgment to enforce payment of taxes on land not described in the delinquent tax-list is void: *Feller v. Cook*, 36 Minn. 338. Where the order of publication and notice of tax-sale described the land as in B.'s addition, but the judgment and sheriff's deed described it as in B.'s second addition, the judgment was void: *Millner v. Shipley*, 94 Mo. 106. The defendant cannot complain that the judgment described the property more fully than it is described in the petition: *Powell v. Louisville (Ky.)*, 52 S. W. Rep. 791. In *Barnum v. Barnes*, 118 Mich. 264, it was held that the decree need not contain a description of the lands ordered to be sold, as the statute pre-

scribes its form and indicates that the tax-record with its entries is by reference a part of it. The case of *Minneapolis R. Terminal Co. v. Minnesota Debenture Co.*, 81 Minn. 66, holds that describing in tax-proceedings a tract as one parcel which is in fact two parcels would be a defense in an application for judgment, but is not available as a collateral attack on the judgment against the tract as an entirety. It was decided in *Kern v. Clarke*, 59 Minn. 70, that after land has been sold on a tax judgment which is void because the land is described incorrectly, the court cannot allow the judgment to be amended by inserting the correct description.

² *Morgan v. Tweddle*, 120 Mich. 350; *First Baptist Church v. Roberts*, 120 Mich. 704. A decree which fails to adjudge any sum against the land is void: *Case v. Skinner*, 121 Mich. 206. Judgment held void on its face for uncertainty of amount: *Fagan v. Huntress, etc. Lumber Co.*, 80 Minn. 441.

³ *Parker v. Jacksonville*, 37 Fla. 342; *Whatcom County v. Fairhaven Land Co.*, 7 Wash. 101. There are cases holding that if the court acquires jurisdiction a judgment will not be void because of being a joint judgment against several lots belonging to the same owner; nor will the deed be void for following the judgment: *Howard v. Stevenson*, 11 Mo. App. 410; *Brown v. Walker*, 11 Mo. App. 226, citing *Norton v. Quimby*, 45 Mo. 388; *Waddell v. Williams*, 50 Mo. 216; *Hewitt v. Weatherby*, 57 Mo. 276; *Whitman v. Taylor*, 60 Mo. 127. See to the same effect, *Gray v.*

an entirety to several persons, some of whom pay parts of the tax, the court in rendering judgment should ascertain what interests are delinquent, and exonerate the rest.¹ A separate judgment for each year is unnecessary on a foreclosure of tax-liens where taxes for two or more years are due and forfeited.² Including in a tax judgment an illegal item of tax, or fees which cannot accrue until after the sale, and which may never accrue, renders the judgment and the deed thereunder void in Illinois;³ while it is held in Minnesota that the judgment is not void for including taxes that should not have been included.⁴ A judgment is void which is given in figures merely, with neither words nor signs to indicate that money is intended, or, if it is, what denomination of money the figures stand for.⁵ In some jurisdictions it is held that the lien upon a railroad for taxes or assessments cannot be enforced by adjudging sale of the body of the railroad.⁶ In Illinois a judgment for road taxes may be against all of a railroad company's

Bolles, 74 Mo. 419; *Wellshear v. Kelley*, 69 Mo. 343; *Jones v. Driskell*, 94 Mo. 190. In *Cruzen v. Stephens*, 123 Mo. 337, it was held that a tax-judgment is not void collaterally because each tract of land is not especially charged with the items of tax applicable to it only. But the principle of these cases is doubted in *Leroy v. Reeves*, 5 Sawy. 102.

¹ *People v. Shimmins*, 42 Cal. 121. See *Leroy v. Reeves*, 5 Sawy. 102.

² *People v. Weber*, 116 Ill. 412.

³ *Coombs v. Goff*, 127 Ill. 431; *Drake v. Ogden*, 128 Ill. 603; *Gage v. Lyons*, 138 Ill. 590; *Gage v. Goudy*, 141 Ill. 215. See *Auditor-General v. McLaulin*, 83 Mich. 352. Judgment not exceeding amount properly due not reversed though based on record containing errors of computation and including illegal items: *Chambers v. People*, 113 Ill. 509. A judgment enforcing a tax-lien cannot charge the land with costs of sale, etc., when the sale was void for want of a sufficient description in the assessment: *Texarkana Water Co. v. State*, 62 Ark. 788.

⁴ *Kipp v. Dawson*, 31 Minn. 273; *Stewart v. Coulter*, 31 Minn. 385.

⁵ *Woods v. Freeman*, 1 Wall. 398; *Lawrence v. Fast*, 20 Ill. 338; *Lane v. Bommelmann*, 21 Ill. 143; *Eppinger v. Kirby*, 23 Ill. 521; *Dukes v. Rowley*, 24 Ill. 210; *Bailey v. Doolittle*, 24 Ill. 577; *Millard v. Truax*, 99 Mich. 157; *McKinnon v. Meston*, 104 Mich. 642; *Case v. Skinner*, 121 Mich. 206; *Russell v. Chittenden*, 123 Mich. 546; *Norris v. Hall*, 124 Mich. 170; *Nowlen v. Hall* (Mich.), 87 N. W. Rep. 222. The omission of the dollar-mark from the published list of delinquent lands does not avoid a decree for their sale, where the figures were divided in such manner as to indicate a place for dollars and cents, and where they were sufficiently indicated in the decree itself: *Muirhead v. Sands*, 111 Mich. 487.

⁶ *Louisville, N. A. & C. R. Co. v. State*, 122 Ind. 443, 8 Ind. App. 377. See *Louisville, N. A. & C. R. Co. v. Boney*, 117 Ind. 501. A personal judgment may, however, be entered against the company: *Louisville, N.*

track in the county if none of the taxes has been paid, separate judgments against the tracks in each road-district not being necessary.¹

Judgments in proceedings to enforce taxes on real estate are favored by the same presumption that attends judgments in any other kind of suit or action.² If rendered with competent jurisdiction³ they cannot, as a general rule, be attacked collaterally upon questions relating to the validity of the tax, or to the regularity of the assessment, levy, or return, or to the regularity of the court proceedings,⁴ but attack upon such matters

A. & C. R. Co. v. State, 8 Ind. App. 377.

¹ Ohio & M. R. Co. v. People, 119 Ill. 207.

² Allen v. McCabe, 93 Mo. 138. Where the judgment is in the form required by statute, the presumption in favor of its validity is not overcome by the mere fact that no affidavit of publication has been filed: Hoyt v. Clark, 64 Minn. 139.

³ That the court lacked jurisdiction to render a tax-judgment may be shown by evidence *dehors* the record: Brown v. Corbin, 40 Minn. 508.

⁴ Riddle v. Messer, 84 Ala. 236; see Wallace v. Brown, 22 Ark. 118; McCarter v. Neil, 50 Ark. 188; Boehm v. Botsford, 52 Ark. 400; Caldwell v. Martin, 55 Ark. 470; Martin v. Hawkins, 62 Ark. 421; Eitel v. Foote, 39 Cal. 439; Atkins v. Hinman, 2 Gilm. 437; Chestnut v. Marsh, 12 Ill. 173; Merritt v. Thompson, 13 Ill. 716; Hertig v. People, 159 Ill. 237; Dickey v. People, 160 Ill. 663; Casey v. People, 165 Ill. 49; Young v. People, 171 Ill. 299; Carrington v. People (Ill.), 63 N. E. Rep. 163; McCann v. Jean, 134 Ind. 518; Daily v. Newman, 14 La. An. 580; Cole v. Shelp, 98 Mich. 56; Watts v. Bublitz, 99 Mich. 586; Muirhead v. Sands, 111 Mich. 487; Hilton v. Dumphrey, 113 Mich. 241; Ball v. Copper Ridge Co., 118 Mich. 7; Hooker v. Bond, 118 Mich. 255; Spaulding v. O'Connor, 119

Mich. 45; Shefferly v. Auditor-General, 120 Mich. 455; Thomas v. Auditor-General, 120 Mich. 535; McFadden v. Brady, 120 Mich. 699; Haven v. Owen, 121 Mich. 51; Wilkin v. Keith, 121 Mich. 66; Nester v. Church, 121 Mich. 81; Gates v. Johnson, 121 Mich. 663; Hoffman v. Pack, 123 Mich. 74; Monroe v. Winegar (Mich.), 87 N. W. Rep. 396; Chauncey v. Wass, 35 Minn. 1; Gribble v. Livermore, 64 Minn. 696; Minneapolis R. Terminal Co. v. Minnesota Debenture Co., 81 Minn. 66; Metcalfe v. Perry, 66 Miss. 68; Payne v. Lott, 90 Mo. 676; Jones v. Driskill, 94 Mo. 190; Hill v. Sherwood, 96 Mo. 125; Allen v. Ray, 96 Mo. 542; State v. Hunter, 98 Mo. 386; Schmidt v. Neimeyer, 100 Mo. 207; Coombs v. Crabtree, 105 Mo. 292; Boyd v. Ellis, 107 Mo. 394; State v. Boyd, 128 Mo. 130; State v. Farmers', etc. Nat. Bank, 144 Mo. 381; Stevenson v. Black (Mo.), 68 S. W. Rep. 909; Merriam v. Goodlett, 36 Neb. 384; Emmons County v. First Nat. Bank, 9 N. D. 583; Wilkins' Lessee v. Huse, 9 Ohio 154; Carter v. Walker, 2 Ohio St. 339; Cadmus v. Jackson, 52 Pa. St. 295; Ex parte Kellogg, 6 Vt. 509; Edgerton v. Hart, 8 Vt. 207. A decree for the sale of land made in proceedings in which the court had not jurisdiction is subject to collateral attack: Tromble v. Hoffman (Mich.), 90 N. W. Rep. 694.

must be in a direct proceeding for the purpose; that is to say, by motion or petition in the same case, or by bill of review, or by some proceeding in the nature of a review in error.¹ Even the defense of payment, unless raised before the judgment or decree, will be excluded,² although the laws of some states permit this showing to be made subsequently.³ Sometimes, also, the statute allows the judgment to be attacked by showing that the land was not liable for the tax.⁴ Collateral attack on account of unconstitutionality, or of fraud, accident, or mistake, has also been permitted.⁵ A recital in the decree that "notice" has been "given as required by law," or that there has been "proper notice," does not, usually, preclude a showing to the contrary.⁶

¹ As to vacating or altering decree of sale in Michigan, see *Benedict v. Auditor-General*, 104 Mich. 269; *Aztec Copper Co. v. Auditor-General* (Mich.), 87 N. W. Rep. 895; *Tromble v. Hoffman* (Mich.), 90 N. W. Rep. 694. In proceedings to set aside a decree for the sale of non-exempt lands for unpaid taxes, the decree, though entered without jurisdiction, should not be vacated until the petitioner has reimbursed the purchaser: *Aztec Copper Co. v. Auditor-General*, *supra*. Vacation on motion, at a subsequent term, of the judgment under which the sale was had, does not affect one who buys from the vendee without notice: *Schiffman v. Schmidt*, 154 Mo. 204. It was held under the North Dakota statute that a real estate tax-judgment and sale thereunder would not be vacated on motion because of mere irregularity in the entry of the tax-judgment; the only means of attack is by civil action: *Emmons County v. Thompson*, 9 N. D. 598.

² *Williamson v. Mimms*, 49 Ark. 336; *Doyle v. Martin*, 55 Ark. 37; *McCarter v. Neil*, 50 Ark. 188; *Chauncey v. Wass*, 35 Minn. 1; *Jones v. Driskill*, 94 Mo. 190; *Hill v. Sherwood*, 96 Mo. 125; *State v. Boyd*, 128 Mo. 130; *Cad-*

mus v. Jackson, 52 Pa. St. 295. See *Huber v. Pickler*, 94 Mo. 382.

³ See *Curry v. Hinman*, 11 Ill. 420; *Conway v. Cable*, 37 Ill. 82. Under the present Michigan tax-law the decree forecloses all questions as to the regularity of proceedings prior to the decree, not relating to the payment of the taxes or the exemption of the property from taxation: *Muirhead v. Sands*, 111 Mich. 487.

⁴ See *Drake v. Ogden*, 128 Ill. 603; *Gage v. Goudy*, 141 Ill. 215, where, under a statute providing that the judgment should be "conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or special assessments have been paid, or the real estate was not liable for the tax or assessment," it was held that if part of the tax included in the judgment was levied by a town for a purpose wholly unauthorized, the case fell within the exception.

⁵ See *Williamson v. Mimms*, 49 Ark. 336.

⁶ See *McGee v. Fleming*, 82 Ala. 276; *Gregory v. Bartlett*, 55 Ark. 30. See, also, *Riddle v. Messer*, 84 Ala. 236. As to the force of recitals in the judgment or decree see, further, *Atkins v. Hinman*, 2 Gilm. 437; *Young*

It has been held that sale is not void because made before the decree was enrolled.¹

Restraint of waste. In some states the laws provide that in case of failure to pay the taxes assessed on lands within the time fixed by law, an injunction restraining waste on such lands may issue if they are chiefly valuable for their timber. Decisions under these laws are referred to in the margin.²

Interference with collection. It is held on grounds of public policy that taxes due from individuals to a municipal corporation, and tax-moneys collected by suit or otherwise for such a corporation, are not subject to seizure on garnishment or other process by a judgment creditor of the municipality.³

Penalties for non-payment. In tax-laws penalties are imposed for mere delinquencies, in order to hasten payment, and they are also imposed as a punishment for frauds, evasions, and neglect of duty. In some cases, also, special inducements are held out to prompt performance of duty, by making deductions in case of early payment.⁴

Penalties are more often imposed under federal than under state laws, and under the internal revenue laws and the laws imposing customs duties there is special occasion for them.⁵ They are sometimes imposed by the taxing officers, and some-

v. Thompson, 14 Ill. 380; Dukes v. Rowley, 24 Ill. 210; Baily v. Doolittle, 24 Ill. 578; Deutler v. State, 4 Blackf. 258; Williams v. State, 6 Blackf. 36; Stevenson v. Black (Mo.), 68 S. W. Rep. 909.

¹ Youngs v. Peters, 118 Mich. 45; Barnum v. Barnes, 118 Mich. 264.

² Caldwell v. Ward, 83 Mich. 13, 88 Mich. 378; Rossman v. Adams, 91 Mich. 69; Prentice v. Westen, 111 N. Y. 460.

³ Underhill v. Calhoun, 63 Ala. 216 (overruling Smoot v. Hart, 33 Ala. 69); Egerton v. Third Municipality, 1 La. An. 435; Municipality v. Hart, 6 La. An. 570; Droz v. East Baton Rouge, 36 La. An. 340; Moore v. Chattanooga, 8 Heisk. 850; Brown v.

Gates, 15 W. Va. 131. It was held in Sherman v. Shobe, 94 Tex. 126, that the exemption from creditors of money raised by taxation for the payment of the current expenses of the city government protects from garnishment a county's indebtedness to such city for expenses paid by it in maintaining the quarantine made necessary by an epidemic.

⁴ See Sprague v. Bailey, 19 Pick. 436.

⁵ See a charge to the grand jury by Judge Benedict in 6 Blatchf., appendix. And for a constitutional question concerning such penalties, see De Treville v. Smalls, 98 U. S. 517. See, also, United States v. Brooklyn, etc. R. Co., 14 Fed. Rep. 284.

times made recoverable by suit or indictment.¹ We have seen also that under state laws, if a taxpayer neglects or refuses to furnish his list for the assessment, a penalty of some sort is imposed; perhaps the deprivation of the right to be heard on the review of the assessment;² perhaps an addition to the tax that would be otherwise imposed.³ But penalties are most often provided under state laws for neglect to pay the taxes in due season, and they consist then in an addition of some definite per cent. to the tax.

There can be no doubt of the right to impose penalties for neglect or refusal to perform duty under tax-laws where the law providing therefor gives full opportunity for a hearing;⁴ but whether it would be competent without such a hearing has been questioned in some cases.⁵ But when the penalty is imposed in the course of the proceedings to assess, and by officers who, for that purpose, exercise a *quasi*-judicial authority, and where the party is given the opportunity to be heard and to contest his delinquency, either before the assessing officer, or in some form of appeal, the imposition of a penalty does not seem to be out of harmony with the general spirit or general course of tax proceedings, and perhaps may be sustained on the same principles that support tax-laws in general.⁶ And

¹ If the failure to make return of one's taxables is a penal offense, it should appear of record that the party is delinquent, and the process against him should distinctly describe the offense: *Evans v. Commonwealth*, 13 Bush 269.

² See *ante*, pp. 621-623.

³ See *ante*, pp. 620, 621.

⁴ *State v. Moss*, 69 Mo. 495. A provision that any property which has escaped taxation for the last preceding year, if still owned by the same person, may be assessed for double its value, is constitutional, as it is competent for the legislature to enforce by a penalty the failure to have one's property assessed at the right time: *Biddle v. Oaks*, 59 Cal. 94. See *State v. Sage*, 75 Minn. 448.

⁵ See *Scammon v. Chicago*, 44 Ill. 269; *Clayton v. Chicago*, 44 Ill. 280;

Burger v. Carter, 1 McM. 410; *Wauwatosa v. Gunyon*, 25 Wis. 271. Compare *Potts v. Cooley*, 56 Wis. 45.

⁶ That the legislature has general power to impose penalties for neglect or evasion of duty in tax cases, see *Western Union Tel. Co. v. Indiana*, 165 U. S. 304; *People v. Reis*, 76 Cal. 269; *Weaver v. State*, 89 Ga. 639; *Western Union Tel. Co. v. State*, 146 Ind. 54; *Bigger v. Ryker* (Kan.), 63 Pac. Rep. 740; *State v. Cox*, 52 La. An. 2049; *Liquidating Com'rs v. Tax Collector*, 106 La. An. 130; *United States Electric P. & L. Co. v. State*, 79 Md. 63; *State v. Huffaker*, 11 Nev. 300; *Ex parte Lynch*, 16 S. C. 32. That equity cannot relieve against them, see *Chicago, etc. R. Co. v. Carroll County*, 41 Iowa 153. For cases of penalties imposed in Pennsylvania by the taxing officers, under laws

if the penalty is for delay in making payment, the occasion for a hearing is not very obvious, since no possible advantage could result from it.¹ Possibly, however, even in such cases, there might be excuses for non-payment which would justify the interference of the courts. It has been held that if the delay is attributable in part to the state itself, which set up title to the land taxed, the collection of a penalty might be

which gave an appeal to the courts, reference may be made to *Weaver v. State*, 89 Ga. 639; *Drexel v. Commonwealth*, 46 Pa. St. 37; *Commonwealth v. Wyoming Valley Canal Co.*, 50 Pa. St. 410. As to penalties collected by prosecution, see *State v. Welch*, 28 Mo. 600; *Olds v. Commonwealth*, 3 A. K. Marsh. 465; *Lee v. Commonwealth*, 6 Dana 311; *Alexander v. Commonwealth*, 1 Bibb 515; *McCall v. Justices*, 1 Bibb 516; *Chiles v. Commonwealth*, 4 J. J. Marsh. 578; *State v. Manz*, 6 Cold. 557; *Elam v. State*, 25 Ala. 53; *Smith v. State*, 43 Ala. 344. These cases, as well as that of *Delaware Division Canal Co. v. Commonwealth*, 50 Pa. St. 399, recognize the rule that all statutes of this nature must be construed strictly. A municipal corporation cannot impose a penalty for neglect to pay taxes promptly, unless expressly authorized by law to do so: *Augusta v. Dunbar*, 50 Ga. 387. In some cases it has been held that a municipality under a general power to lay and collect taxes may prescribe and collect penalties for non-payment: *Denver City R. Co. v. Denver*, 21 Colo. 350; *Burlington v. Railroad Co.*, 41 Iowa 135; *Slack v. Ray*, 26 La. An. 674; *Morrison v. Larkin*, 26 La. An. 699; *State v. Consolidated, etc. Co.*, 16 Nev. 445. Penalties the same as in the case of non-payment of taxes levied for general purposes may be added in case of non-payment of taxes levied by a municipality for local improvements: *State v. Norton*, 63 Minn. 497.

¹ It is within the discretion of the legislature to determine the amount of the penalty to be imposed by statute for the non-payment of taxes: *Western Union Tel. Co. v. Indiana*, 165 U. S. 304, affirming *Western Union Tel. Co. v. State*, 146 Ind. 504, and sustaining the provision of the Indiana statute that if a telegraph company refuse to pay a tax against it, and action therefor be brought in the name of the state by the auditor-general, judgment shall include a penalty of fifty per cent. In the following cases penalties ranging from ten to thirty per cent. are held valid: *Scott v. Watkins*, 22 Ark. 556; *Lacey v. Davis*, 4 Mich. 140; *Drennan v. Herzog*, 56 Mich. 467; *Westport v. McGee*, 128 Mo. 152; *Myers v. Park*, 8 Heisk. 550; *Nance v. Hopkins*, 10 Lea 508; *Potts v. Cooley*, 56 Wis. 45. The right to prescribe a special rate of interest as a penalty for failure in prompt payment was affirmed in *Eyer mann v. Blakesley*, 9 Mo. Ap. 231. See, also, *Craig v. Flanagan*, 21 Ark. 319; *Pope v. Macon*, 23 Ark. 644; *High v. Shoemaker*, 22 Cal. 363; *People v. Todd*, 23 Cal. 181; *Mulligan v. Hintrager*, 18 Iowa 171; *People v. Horn Silver Mining Co.*, 105 N. Y. 76. Penalties cannot be compounded for one default, nor can they be imposed for the non-payment of an illegal tax: *Worthen v. Badgett*, 32 Ark. 496. See *Texarkana Water Co. v. State*, 62 Ark. 188. Or of an excessive tax: *Pike v. Cummings*, 36 Ohio St. 213. It was, however, held in *State v. Virginia & T. R. Co.*, 24

enjoined,¹ and in another case it is said that the penalty should not be exacted if the delay came from serious doubt of the validity of the tax.²

Penalties must be plainly imposed or they cannot be exacted,³ and if one is illegal in part it is wholly void.⁴ The

Nev. 53, that where taxes have been allowed to become delinquent, the fact that the assessment is above the value of the property does not prevent penalties for non-payment from attaching as to taxes legally due. A provision that unpaid taxes should bear interest at one per cent. a month was held not to apply to taxes due and unpaid for prior years, as the interest and the tax for each year would be so blended that the percentage could not be reckoned on the tax alone: *People v. Peacock*, 98 Ill. 172.

¹ *Litchfield v. Webster County*, 101 U. S. 773.

² *Savannah, etc. R. Co. v. Morton*, 71 Ga. 24. Until there is an identification of the property subject to taxation, and a determination of the amount of taxes due, it would be inequitable to charge penalties for non-payment of taxes: *United States Trust Co. v. New Mexico*, 183 U. S. 535. The penalty for not paying a collateral-inheritance tax on part of testator's estate in another state should not be imposed where the question of liability has not been settled: *In re Miller's Estate*, 182 Pa. St. 157. Penalties for non-payment of taxes can only be imposed after the taxpayer has had an opportunity to pay and fails to do so. So, where part of a tax is illegal, and the party has had no opportunity of paying the legal part alone: *Redwood County v. Winona & St. P. L. Co.*, 40 Minn. 512. See *Gallup v. Schmidt*, 154 Ind. 196. A statute imposing interest at the rate of twelve per cent. on unpaid balances of, and judgments for, taxes due the state, ap-

plies only to cases of intentional or inexcusable delay on the taxpayer's part, and interest will not be charged pending a motion for re-argument of an appeal: *Commonwealth v. Philadelphia & R. C. & I. Co.*, 145 Pa. St. 283. Penalty for delinquency withheld because of city's failure to demand tax pending appeal: *Ferguson v. Pittsburgh*, 159 Pa. St. 435. Penalty for delay held not enforceable against a receiver where officers had not made application for payment: *Walters v. Western & A. R. Co.*, 68 Fed. Rep. 1002. It was held in *Mackay v. San Francisco*, 113 Cal. 392, that a bondholder's refusal to pay the taxes on his bonds under the erroneous conclusion that they were not taxable was not a defense to the statutory penalties for delinquency. And even though the delay in paying a tax is caused by an appeal upon which the amount of the original assessment is reduced, yet for such delay the taxpayer is liable to pay as a penalty interest on the amount as finally settled: *Western Union Tel. Co. v. State*, 64 N. H. 265; *Winnipiseogee L. C. & W. Manuf. Co. v. Gilford*, 64 N. H. 514. For a question of remission of penalties see *Beecher v. Webster Supervisors*, 50 Iowa 538.

³ *Elliott v. Railroad Co.*, 99 U. S. 573; *Gallup v. Schmidt*, 154 Ind. 196; *Jackson, etc. Co. v. Snyder*, 93 Mich. 325; *Landis v. Vineland*, 61 N. J. L. 424. Where a judgment for taxes includes compound interest on penalties it will not support a sale: *Harland v. Eastman*, 119 Ill. 22.

⁴ *Railroad Co. v. Stark*, Holmes 231.

laws imposing them must be followed strictly,¹ and they cannot be given retroactive effect.² If the statute imposing them is repealed the penalties are gone, and a clause reserving to the state all the ordinary remedies for the collection of the taxes will not save them.³ As penalties are not favored in equity, a penalty for non-payment of taxes will not be enforced in a proceeding to enforce a lien for the taxes where a claim for such penalty was not made in the petition.⁴ But

¹ *Gachet v. McCall*, 50 Ala. 307; *Hunter v. Borek*, 51 Ohio St. 320. Statutory provision that unpaid taxes shall bear interest at a specified rate does not apply to special assessments for local improvements: *Murphy v. People*, 120 Ill. 234; *Hosmer v. People*, 134 Ill. 317. See for construction of statutes, *United States v. Brooklyn, etc. R. Co.*, 14 Fed. Rep. 284; *Central T. Co. v. Condon*, 67 Fed. Rep. 84, 14 C. C. A. 314; *People v. North Pacific Coast R. Co.*, 68 Cal. 551; *Evansville & T. H. R. Co. v. West*, 139 Ind. 254; *Rogers v. Kansas City, T. & W. R. Co.*, 48 Kan. 471; *Vicksburg, S. & P. R. Co. v. Traylor*, 104 La. 284; *People v. Wemple*, 61 Hun 53; *White v. Woodward*, 44 Ohio St. 347; *New Whatcom v. Raeder*, 22 Wash. 570. As to when interest is chargeable upon inheritance taxes, see *In re Stewart's Estate*, 61 Hun 551, 131 N. Y. 274; *In re Davis's Estate*, 91 Hun 53, 149 N. Y. 539; *In re Milne's Estate*, 76 Hun 328; *Commonwealth's Appeal*, 128 Pa. St. 603; *In re Lines's Estate*, 155 Pa. St. 378.

² *Ryan v. State*, 5 Neb. 276; *State v. Jersey City*, 37 N. J. L. 39; *Gager v. Prout*, 52 Ohio St. 89. See *Brown County v. Winona & St. P. L. Co.*, 39 Minn. 380; *Redwood County v. Winona & St. P. L. Co.*, 40 Minn. 512. A statute providing for adding omitted property to the tax-duplicate does not authorize charging the owner with penalties and interest that would have accrued on such

property had it been included in the tax-duplicate at the proper time: *Gallup v. Schmidt*, 154 Ind. 196. It is held, however, in *Webster v. Auditor-General*, 122 Mich. 482, that one who owes delinquent taxes has no vested right to have the rate of interest thereon remain unchanged. So in *Flock v. Smith* (N. J.), 47 Atl. Rep. 442, it is held that after a default in paying taxes the legislature may impose a penalty more severe than the one in force when the default occurred; there being no contractual relation between a municipality and a defaulting taxpayer, and no vested right in the latter to be subject only to the penalty which existed at the time of his default. And in *League v. Texas*, 184 U. S. —, 22 Sup. Ct. Rep. 475, it was held that a state may provide that taxes which have already become delinquent shall bear interest from the time the delinquency commenced.

³ *Commonwealth v. Standard Oil Co.*, 101 Pa. St. 119, citing *Rex v. Justices*, Burr 456; *Schooner Rachel v. United States*, 6 Cranch 329; *Maryland v. Baltimore & O. R. Co.*, 3 How. 534; *Norris v. Crocker*, 13 How. 429; *State v. Jersey City*, 37 N. J. L. 39. The case last cited holds that a repealed tax may be revived by subsequent legislation, but that the penalties for the past omission cannot be revived.

⁴ *United States Trust Co. v. New Mexico*, 183 U. S. 535.

after action has been brought to recover delinquent taxes, payment of the penalty cannot be avoided by tendering the taxes and costs.¹

Imposing conditions on the exercise of rights. In some instances statutes have attached to the privilege of exercising the elective franchise the condition that taxes should have been paid for the current year, or within some short period preceding. In some states this is a matter of constitutional requirement. If one evades his duty to the government he may reasonably be denied the privilege of participating in the direction of its affairs; and these constitutional provisions appear to assume that he who, in his own business, acquires nothing upon which he can be taxed, must lack the wisdom and discretion to take part in the business of the state.² In some instances the payment of a tax assessed against one in respect to a chose in action owned by him has been made a condition to the maintenance of a suit upon it.³ In some instances the right to maintain a suit to recover property, which the party claims has illegally been taken from him, has been subjected to the condition that he should first pay the tax for which the property was sold and perhaps all subsequent taxes; but this, we think, has been pushed beyond the constitutional power of the legislature, as we shall endeavor to show hereafter.⁴

¹ *Western Union Tel. Co. v. State*, 146 Ind. 54.

² Constitutional provisions of the kind exist in several of the states. As to the liability of assessors for depriving one of his right to vote by not assessing him, see *Griffin v. Rising*, 11 Met. 33. And see *Re Duffy*, 4 Brewster 531; *Patterson v. Barlow*, 60 Pa. St. 64.

³ See *Lott v. Dysart*, 45 Ga. 355; *Redwine v. Hancock*, 45 Ga. 364; *Scruggs v. Gibson*, 45 Ga. 509; *Greene v. Lowry*, 46 Ga. 55, and many other cases in the subsequent Georgia reports. As to the requirement in Minnesota that a deed before being recorded shall have indorsed thereon certificates respecting taxes and assessments, see *State v. Register of*

Deeds, 26 Minn. 521; *State v. Weld*, 66 Minn. 219.

⁴ See *Taylor v. Burdett*, 11 Leigh 334, in which it was decided to be competent to require evidence of the payment of the taxes as a condition precedent to maintaining a suit for the recovery of the lands taxed. See, also, *Tharp v. Hart*, 2 Sneed 569. But such a provision is to be construed strictly, and will not be applied to the case of special assessments, unless made applicable in terms: *Glass v. White*, 5 Sneed 475. See *Williamsburg v. Lord*, 51 Me. 599. In Maine, in a contest between the original owner of land and a tax-purchaser, it is held that the former is not required to tender taxes until the latter has made out a *prima facie* case:

Stamp taxes are collected by requiring stamps to be affixed to some commodity before it can be sold, some written instrument before it can be made use of, and the like.¹ An early law of congress provided for such taxes, and they were im-

Orono v. Veazie, 57 Me. 517, 61 Me. 431; *Crowell v. Utley*, 74 Me. 49; *Straw v. Poor*, 74 Me. 53. Nor need he make a tender where several parcels have been sold together, so that it cannot be determined how much he should pay: *Phillips v. Sherman*, 61 Me. 548, 551. Nor unless the tax has been duly recorded: *Dunn v. Snell*, 74 Me. 22. In *Weller v. St. Paul*, 5 Minn. 95, the right to enact such laws was denied as being inconsistent with the constitutional right of every citizen "to obtain justice freely and without purchase." In *Plumer v. Supervisors*, 46 Wis. 163, a requirement that the party impeaching a tax-deed shall, before he can obtain a judgment, offer to pay his just proportion of the tax, is held invalid, as it would require payment of a tax before it had been constitutionally laid. In *Eustis v. Henrietta*, 90 Tex. 468, a statute requiring payment of taxes as a condition precedent to making defense to a void claim under a tax-sale was held unconstitutional. In *Curry v. Hinman*, 11 Ill. 420, it was held that a requirement that no person should be permitted to question a tax-title was applicable to plaintiffs only, and not to persons in possession defending under tax-deeds. And in *Conway v. Cable*, 37 Ill. 82, the power to make such a requirement applicable to such persons so defending was denied. Further on this subject see *Lassiter v. Lee*, 68 Ala. 287; *Wilson v. McKenna*, 52 Ill. 43; *Reed v. Tyler*, 56 Ill. 288; *Senichka v. Lowe*, 74 Ill. 274; *Dunn v. Snell*, 74 Me. 22.

¹If the revenue law of a state makes an unstamped note void, it is void everywhere: *Fant v. Miller*, 17 Grat. 47. The failure to stamp an

instrument as required by the federal revenue law does not render it invalid in the absence of intent to defraud the government by the omission, and such an instrument is properly admitted in evidence where no such intent is shown: *Mitchell v. Insurance Co.*, 32 Iowa 421; *Ricord v. Jones*, 33 Iowa 26; *Ogden v. Forney*, 33 Iowa 205. The burden of proof is on the party who relies on the failure so to stamp: *Ricord v. Jones*, *supra*. And where a stamp has been omitted inadvertently it may be affixed at any time before the instrument is admitted in evidence: *State v. May*, 15 Iowa 596; *Harvey v. Wieland* (Iowa), 88 N. W. Rep. 1077; *Knox v. Rossi* (Neb.), 57 Pac. Rep. 179; *Jones v. Western Manuf. Co.* (Wash.), 67 Pac. Rep. 586. An unstamped deed is admissible in evidence when the receipt of the internal revenue collector shows the stamp to have been paid for, he not having affixed it: *Lerch v. Snyder*, 112 Pa. St. 161. As to what documents are required by the federal war-revenue act of 1898 to be stamped, see *Tolman v. Treat*, 106 Fed. Rep. 379; *Merchants' Warehouse Co. v. McClain*, 112 Fed. Rep. 787; *Treat v. Tolman*, 113 Fed. Rep. 892; *Moultham v. Apking* (Iowa), 89 N. W. Rep. 1051; *Noble v. Citizens' Bank* (Neb.), 89 N. W. Rep. 400; *Dawson v. McCarty*, 21 Wash. 314. The absence of a revenue stamp from a document has no bearing upon the inquiry whether the defendant forged such document: *State v. Peterson* (N. C.), 40 S. E. Rep. 9, citing *State v. Hill*, 30 Wis. 416, and *Thomas v. State* (Tex. Cr. App.), 51 S. W. Rep. 242. The act of congress of June 13, 1898, did not forbid an express company's

posed again during and since the rebellion. No reasonable objection in principle can be opposed to such taxes, and except where they were so made use of as to invade the province of state authority,¹ their validity was not seriously questioned.

It is competent, in the case of such taxes on business as cannot be collected in advance, to require security for their payment before the business is entered upon.² A privilege tax may be enforced under the penalty that contracts made while it

requiring the consignor of an express package to furnish or pay for the stamp to be affixed thereto: *American Express Co. v. Michigan*, 177 U. S. 404, reversing *Attorney-General v. American Express Co.*, 118 Mich. 682. To the same effect, *People v. Wells, Fargo & Co. (Cal.)*, 67 Pac. Rep. 895. For cases arising under the Virginia Stamp Act of 1812, see *Mumford's Reports*.

¹The federal statutes requiring revenue stamps to be attached to certain instruments have generally been held in the state courts to be applicable to the use of such instruments in the federal courts only, and not as precluding the introduction in evidence in the state tribunals of such instruments though unstamped: see *Duffy v. Hobson*, 40 Cal. 162; *Trowbridge v. Addoms*, 23 Colo. 518; *Small v. Slocumb*, 112 Ga. 279; *Latham v. Smith*, 45 Ill. 29; *Craig v. Dimock*, 47 Ill. 308; *Bunker v. Green*, 48 Ill. 243; *Hanford v. Obrecht*, 49 Ill. 146; *Wilson v. McKenna*, 52 Ill. 43; *Bowen v. Byrne*, 55 Ill. 467; *Richardson v. Roberts (Ill.)*, 62 N. E. Rep. 840; *Smith v. Hunter*, 33 Ind. 106; *Wallace v. Cravens*, 34 Ind. 534; *Prather v. Zulauf*, 38 Ind. 155, 159; *Magic Packing Co. v. Stone-Ordean-Wells Co. (Ind.)*, 64 N. E. Rep. 11; *Green v. Holway*, 101 Mass. 49; *Moore v. Quirk*, 105 Mass. 49; *Fifield v. Close*, 15 Mich. 505; *Sammons v. Holloway*, 21 Mich. 162; *Burson v. Huntington*, 21 Mich. 415; *Knox v. Rossi (Nev.)*, 57 Pac. Rep.

179; *Moore v. Moore*, 47 N. Y. 467; *New York v. Fromme*, 35 App. Div. (N. Y.), 459, 54 N. Y. Supp. 833; *Cassidy v. St. Germain (R. I.)*, 46 Atl. Rep. 35; *Thomas v. State (Tex. Cr. App.)*, 51 S. W. Rep. 242; *Dawson v. McCarty*, 21 Wash. 314. In Iowa, however, it is held that the federal stamp-act applies to evidence offered in a state court: *Muscatine v. Sterneman*, 30 Iowa 526. As the United States have no power to impose a tax upon the right of an officer of a state government to qualify for his office, the bond of a notary public is exempt from stamp tax: *Bettman v. Warwick*, 108 Fed. Rep. 46.

²*Mason v. Rollins*, 2 Biss. 99; *United States v. Mathoit*, 1 Sawy. 142. Payment in advance of an annual tax may be made a condition precedent to engaging in business, even though the person has been engaged in such business throughout the previous year: *People v. Gault*, 104 Mich. 575. It is held in Louisiana that the court has statutory authority to enjoin an occupation until the license tax is paid, and to punish for contempt for violation thereof: *State v. Fernandez*, 49 La. An. 764. Under the New Jersey statute corporations failing to pay taxes may be enjoined from transacting business: *In re Electro-Pneumatic Transit Co.*, 51 N. J. Eq. 71. In Nebraska, however, the payment of an occupation tax cannot be enforced by requiring such payment as a condition precedent to doing business,

remains unpaid shall be void.¹ Indeed it is a principle of the common law that contracts and arrangements made for the defeat or evasion of the revenue laws of a county are illegal, and the courts will give the parties no remedy in respect to them.² It is necessary, perhaps, that both parties should have knowledge of the intent to violate the law; for if one be innocent there is no reason why the guilty intent of the other should cause him to suffer.³ The principle does not apply to contracts made in evasion of the laws of a foreign country, but it does apply to all contracts made abroad to be performed here.⁴

Collection as between the state and its municipalities.

Where state levies are collected through the agency of county, city, or township officers, it is competent for the state to make the county or other district liable as principal debtor for the

or by the imposition of a criminal punishment for doing business without prior payment: *German American F. Ins. Co. v. Minden*, 51 Neb. 870, citing many Nebraska cases.

¹ *Anding v. Levy*, 59 Miss. 51; *Decell v. Lewenthal*, 57 Miss. 331; *Bowdre v. Carter*, 64 Miss. 221; *Pearson v. Kendrick*, 75 Miss. 416; *Rearden v. Henson* (Miss.), 29 South. Rep. 764. The repeal of the tax does not validate a contract: *Anding v. Levy*, *supra*; *Decell v. Lewenthal*, *supra*. But payment at any time during the month of issue of the annual privilege tax on merchants has retroactive effect to validate a previous contract which, but for payment, would have been void: *American F. Ins. Co. v. First Nat. Bank*, 73 Miss. 469. When a merchant's stock exceeds the limit fixed by the license, the business becomes *eo instanti* illegal: *Sun Mut. Ins. Co. v. Searles*, 73 Miss. 62. The tax may be doubled for failure to take out a license: *State v. Manz*, 6 Cold. 557.

² *Clugas v. Penaluna*, 4 T. R. 466; *Wamell v. Reed*, 5 T. R. 599; *Cope v.*

Rowlands, 2 M. & W. 149; *Smith v. Mawhood*, 14 M. & W. 452; *Harris v. Runnels*, 12 How. 79; *Favor v. Philbrick*, 7 N. H. 326, 340. See, also, *Alexander v. O'Donnell*, 12 Kan. 608; *Howard v. First Indep. Church*, 18 Md. 451; *Bancroft v. Dumas*, 21 Vt. 456. Levy on personalty for tax upheld notwithstanding previous pretended sale made for express purpose of preventing levy: *Gray v. Finn*, 96 Mich. 62.

³ See *Biggs v. Lawrence*, 3 T. R. 454; *Lightfoot v. Tenant*, 1 B. & P. 551, 556; *Clugas v. Penaluna*, 4 T. R. 466; *Kreiss v. Seligman*, 8 Barb. 439; *Ritchie v. Smith*, 6 M., G. & Scott, 462; *Pellecat v. Angell*, 2 Crompt., M. & R. 311; *Foster v. Thurston*, 11 Cush. 322; *Webster v. Munger*, 8 Gray 584; *Cambioso v. Maffett*, 2 Wash. C. C. 98; *Armstrong v. Toler*, 11 Wheat. 258.

⁴ See cases above cited. Also *Holman v. Johnson*, 1 Cowp. 341. And compare *Dater v. Earl*, 3 Gray 482, with *Cambioso v. Maffett*, 2 Wash. C. C. 98.

quota of the state tax assessed within it.¹ Provisions to this effect are common in the statutes. And where the county treasurer is required to give bond to the state for the state

¹See *Burlington v. Railroad Co.*, 41 Iowa 134; *Brown v. Painter*, 44 Iowa 368; *Harper County Com'rs v. Cole*, 62 Kan. 121; *People v. St. Clair Supervisors*, 30 Mich. 388; *People v. Van Tassel*, 73 Mich. 28; *Auditor-General v. Ottawa Supervisors*, 76 Mich. 295; *Auditor-General v. Bay Supervisors*, 106 Mich. 662; *Muskegon v. Muskegon County*, 123 Mich. 272; *Auditor-General v. Bolt*, 124 Mich. 185; *People v. Myers*, 59 Hun 617, 13 N. Y. Supp. 182; *State v. Multnomah County*, 13 Or. 287; *Schuylkill County v. Commonwealth*, 36 Pa. St. 524; *Commonwealth v. Philadelphia County (Pa.)*, 10 Atl. Rep. 772; *Lackawanna County v. Commonwealth*, 156 Pa. St. 477; *Commonwealth v. Philadelphia County*, 157 Pa. St. 531, 550; *Commonwealth v. Philadelphia*, 157 Pa. St. 558; *Commonwealth v. McKean County*, 200 Pa. St. 383; *State v. Laramie County Com'rs*, 4 Wyo. 313. Under the Idaho statutes a county is not liable to the state for uncollected state taxes levied on lands sold and bought in by the county, until lands are disposed of by the county: *State v. Ada County (Idaho)*, 62 Pac. Rep. 457. The provision in Michigan that where a tax-sale is set aside the money refunded shall be charged back to the county does not apply to money paid by a purchaser to cover subsequent taxes, and refunded to him: *Auditor-General v. Patterson*, 122 Mich. 39. When the state treasurer charges over to a county its proportion of the state tax, the county becomes debtor, and cannot burden the state with any drawback of percentage: *Multnomah County v. State*, 1 Or. 358. As to conclusiveness of settlements between state and county, see *Commonwealth v. Luzerne County (Pa.)*, 15 Atl. Rep. 548; *Commonwealth v. Philadelphia County*, 157 Pa. St. 531; *State v. Laramie County Com'rs*, 4 Wyo. 313. As to interest on amounts due the state, see *Auditor-General v. Shiawassee Supervisors*, 74 Mich. 536; *Auditor-General v. Ottawa Supervisors*, 76 Mich. 295; *Auditor-General v. Bay Supervisors*, 106 Mich. 662; *Auditor-General v. Bolt*, 124 Mich. 185; *People v. Fitch*, 148 N. Y. 71; *People v. Myers*, 66 Hun 167, 21 N. Y. Supp. 79; *State v. Marion County*, 36 Or. 371; *Commonwealth v. Philadelphia*, 157 Pa. St. 550. It was held in *State v. Baker County*, 24 Or. 141, that an action on a county's obligation to pay its proportion of the county tax must be brought within six years; but in *Mason v. Hazelton T'p Supervisors*, 82 Mich. 440, it was decided that in the matter of charging back delinquent taxes there is no outlawry as between the state and a county, or a county and one of its townships. A county, when sued for state taxes collected by its treasurer, cannot set up by way of counter-claim a demand of its own against the state: *People v. Van Tassel*, 73 Mich. 28. But when a *mandamus* to compel a board of supervisors to assess and collect a sum alleged to be owing by the county to the state is sought, the board's defense that an item of the alleged indebtedness is invalid is not a counter-claim and may be considered. *Auditor-General v. Shiawassee Supervisors*, 74 Mich. 536. Loss where amount paid by purchaser at tax-sale was refunded to him because sale void, held to fall on state and county proportionately: *Auditor-General v. Bay Supervisors*, 106 Mich.

taxes to be received by him, the failure to give a sufficient bond will not excuse the county. The state is not to suffer from the laches of its agents in such matters.¹

The proceedings in making sale of lands for taxes, the privilege of redemption, and the conveyance when redemption is not made, require, and will receive, separate consideration.

662. Where the constitution provides that "all taxes levied for state purposes shall be paid into the state treasury," a county assessor and tax-collector is not entitled to any commission on state taxes collected in the county: *Guheen v. Curtis*, 2 Idaho 1151. A statute providing for the payment to the county of a commission by the state of ten per cent of all poll-taxes collected does not infringe a constitutional provision that one-half of the poll-taxes collected shall be paid to the state and one-half to the county; the commission being an allowance for the expense of collection, and the state being liable for its share: *State v. Donnelly*, 20 Nev. 214. Collection fee held to belong to state or to county according as it was paid to auditor-general or to county treasurer: *Auditor-General v. Bay Supervisors*, 106 Mich. 662. As to the payment of the state tax where part of a county has been detached and formed into a new county, see *Ontonagon Supervisors v. Gogebic Supervisors*, 74 Mich. 721; *Auditor-General v. Bay Supervisors*, 106 Mich. 662. Where *mandamus* is sought to compel a city to pay state and county taxes of a certain year, it is no defense that in the preceding year there were made by the county board illegal appropriations which require the imposition of an additional amount of taxes a year

later: *Shields v. Paterson*, 55 N. J. L. 495. As to accounts between county and township as to tax moneys, see *Mason v. Hazelton T'p Supervisors*, 82 Mich. 440; *Cumming T'p v. Ogemaw County*, 93 Mich. 314, 100 Mich. 567; *Haines v. Saginaw Supervisors*, 99 Mich. 32; *Muskegon v. Soderberg*, 111 Mich. 559; *Westboro v. Taylor County*, 90 Wis. 355; *Iron River v. Bayfield County*, 106 Wis. 587.

¹See cases cited in the preceding note. In Pennsylvania a county is liable to towns for money collected by a defaulting county treasurer: *Potter County v. Oswayo T'p*, 47 Pa. St. 162. In Kansas a county is not liable to a township for its quota until the amount has actually been collected: *Guittard T'p v. Marshall County*, 4 Kan. 388. A county treasurer in Michigan collects the liquor-tax as agent for the towns, and if he becomes a defaulter a town cannot, to make good the loss, withhold county moneys: *Marquette County v. Ishpeming T'p*, 49 Mich. 244. In Wisconsin, if the town treasurer fails to collect all the taxes specified in his warrant, he retains, after paying over the state taxes collected by him, the town taxes, and pays over the balance to the county: *Winchester v. Tozer*, 24 Wis. 312. As to the course in New York, see *New York v. Daventport*, 92 N. Y. 604.

CHAPTER XV.

THE SALE OF LANDS FOR UNPAID TAXES.

When made. Lands are sold¹ by the government for taxes, either because the assessments made upon them are not paid within the time allowed by law for their voluntary satisfaction by the owner, or because a personal assessment against the owner remains uncollected by the ordinary process.² Whether the sale is to be made for the one reason or for the other, the same principles will govern it, though in some particulars the proceedings will differ.

The land must be liable. As government has no inherent right to deprive the citizen of his property except in pursuance of regular and lawful proceedings, and for a lawful demand, a sale of lands will be void if they were not liable for the tax.³ If by law they were exempt from taxation, a sale will be void

¹ A tax-sale is defined as "a sale made of property proceeded against by the state as belonging to some one other than itself, in enforcement of taxes due by that property and its owners;" *Gulf States L. & I. R. Co. v. Wade*, 51 La. An. 251.

² Statute authorizing sale of land for personal tax held not contrary to public policy or to any constitutional provision: *Lorimer County Bank v. National State Bank*, 11 Colo. 564. See *Cramer v. Armstrong* (Colo.), 66 Pac. Rep. 889. Sale of land for taxes on personalty held to be authorized by the statute: *Iowa Land Co. v. Douglas County*, 8 S. D. 491.

³ Where, before decree of sale was entered, the tax had been set aside in a suit brought by the owner of the land, such decree and the consequent sale and deed were held invalid: *Thomas v. Auditor-General*,

120 Mich. 525. Under a statute authorizing the sale of land in arrears for previous years, but providing that it "shall not affect purchasers without notice," it was held that where one who bought land on foreclosure of a mortgage held by him had no notice at the time of its execution or assignment to him that taxes were in arrears, the land was not liable therefor, though he had notice prior to the sale: *Moore v. Sugg*, 114 N. C. 292. Realty of which one is in possession under a contract of purchase, upon which part of the purchase-money has been paid, may be sold for his taxes: *Morgan v. Burks*, 90 Ga. 287. Statutes as a rule do not require any formal levy upon lands as a step in the proceedings to a sale. As to what was sufficient under the federal revenue law, see *United States v. Hess*, 5 Sawy. 533.

though for a tax actually assessed;¹ and so it will be if made for a tax legally assessed but which in some lawful manner has been discharged.² The description of the land in the proceedings which are to result in a sale should in substance at least conform to that in the assessment, and be sufficient for identification,³ and the statutory power must not, even by a single day, be anticipated in the steps taken.⁴

Necessity for regular proceedings. To the validity of any sale of lands for taxes it is imperatively necessary that the

¹Hobson v. Dutton, 9 Kan. 477; Doty v. Bassett, 44 Kan. 574; Taylor Bros. Iron Works Co. v. New Orleans, 44 La. An. 554; Hoskins v. Illinois Central R. Co., 78 Miss. 768; McHenry v. Brett, 9 N. D. 68; Cunningham v. Brown, 39 W. Va. 588. Where the state has canceled, for non-payment, a sale of school lands, a purchaser at a subsequent tax-sale acquires no interest in the land: State v. Frost (Wash.), 64 Pac. Rep. 902. A deed on a sale for taxes assessed against one to whom the county executed a void conveyance conveys no title: Moss v. Kauffman, 131 Mo. 424. A sale for unpaid taxes of lands which, having been forfeited to the state, are exempt from taxation, is void, and gives the purchaser no right or title of any sort to or in the lands: Braxton v. Rich, 47 Fed. Rep. 178, 158 U. S. 375. A deed given on a sale of exempt lands is void. In an action between individuals based on such a deed the question whether the exemption has not been forfeited cannot be raised: Mackall v. Canal Co., 94 U. S. 308. Property constructively in the custody of a court through its receiver or under a decree of sale is not subject to sale for delinquent taxes: Virginia, etc. Co. v. Bristol Land Co., 88 Fed. Rep. 134; County Com'rs v. Clarke, 36 Md. 206. County held not estopped from claiming that sale was invalid because lands were ex-

empt from taxation as belonging to the county: Gilbert v. Pier, 102 Wis. 334. An action to set aside a tax-deed is not subject to the one-year statute of limitations where at the time the tax was levied the land was exempt: Chicago & N. W. R. Co. v. Arnold (Wis.), 90 N. W. Rep. 434. Under the Mississippi code the fact that land not liable to taxation was included in the sale of land which was taxable was held not to affect the validity of the sale, where there was no evidence that the amount legally chargeable on the land was paid or tendered to the tax-collector before sale: Lewis v. Vicksburg & M. R. Co., 67 Miss. 82.

²Gould v. Day, 94 U. S. 405.

³Williams v. Central Land Co., 32 Minn. 440. A tax-sale of property not described in the assessment roll is void and passes no title to the purchaser: Woods v. Freeman, 1 Wall. 398; Lawrence v. Fast, 20 Ill. 339; Tidd v. Rives, 26 Minn. 201; Power v. Larabee, 2 N. D. 141; Van Cise v. Carter, 9 S. D. 234; Turner v. Hand County, 11 S. D. 348. A sale of land for taxes part of which were assessed on another parcel is void: Turner v. Boyce, 11 Misc. Rep. 502, 33 N. Y. Supp. 433.

⁴Gomer v. Chaffee, 6 Colo. 314; Harkreader v. Clayton, 56 Miss. 383; Caston v. Caston, 60 Miss. 475; Conrad v. Darden, 4 Yerg. 307.

land shall have been subject to taxation; that it shall have been actually assessed for taxation and a tax levied, and that, as to all the official proceedings leading up to a sale, there should be at least *prima facie* evidence of substantial compliance with the provisions of law on the subject.

Tax sales are made exclusively under a statutory power. The power which the state confers to assess and levy taxes does not of itself include a power to sell lands in enforcing collection, but the power to sell must be expressly given.¹ The officer who makes the sale sells something he does not own, and which he can have no authority to sell except as he is made the agent of the law for the purpose. But he is made such agent only by certain steps which are to precede his action, and which, under the law, are conditions to his authority. If these fail the power is never created. If one of them fails it is as fatal as if all failed. Defects in the conditions to a statutory authority cannot be aided by the courts; if they have not been observed the courts cannot dispense with them, and thus bring into existence a power which the statute only permits when the conditions have been fully complied with.² Neither, as a general rule, can the courts aid the defective execution of a statutory power; they may do this when the power has been created by the owner himself, and when such action would presumptively be in furtherance of his purpose in creating it; but a statutory power must be executed according to the statutory directions, and presumptively any other execution is opposed to the legislative will, instead of in furtherance of it.³ It is therefore accepted as an axiom, when tax sales are under consideration, that a fundamental condition to their validity is that there should have been a substantial compliance with the law in all the proceedings of which the sale was the culmi-

¹ See *McInerny v. Reed*, 23 Iowa 410; *Sibley v. Smith*, 2 Mich. 486; *Sharp v. Speir*, 4 Hill. 76. A thirty-acre tract of land within the limits of a city is a "lot" within a statute authorizing the sale of "lots in towns and cities" forfeited for non-payment of taxes; *Texarkana Water Co. v. State*, 62 Ark. 188.

² See *Lyon v. Alley*, 130 U. S. 177; *Shedd v. Disney*, 139 Ind. 240; *Jones*

v. Landis T'p, 50 N. J. L. 374; *Joslyn v. Rockwell*, 59 Hun 129, 13 N. Y. Supp. 311; *Olsen v. Bagley*, 10 Utah 422; *Eastman v. Gurrey*, 15 Utah 410. As to the prerequisites in Louisiana, see *Trainor's Succession*, 27 La. An. 150; *Jackson v. Wren*, 36 La. An. 315; *State v. Cannon*, 44 La. An. 734; *Mays v. Witkovski*, 46 La. An. 1475.

³ *Guisebert v. Etchison*, 51 Md. 478.

nation.¹ This would be the general rule in all cases in which a man is to be divested of his freehold by adversary proceedings; but special reasons make it peculiarly applicable to the case of tax sales.² These reasons are thus summarized by the supreme court of Maine: "Sales of real estate for the non-payment of taxes must be regarded in a great measure as an *ex parte* proceeding. The owner is to be deprived of his land thereby; and a series of acts preliminary to the sale are to be performed to authorize it on the part of the assessors and collector, to which his attention may never have been particularly called; and experience and observation render it notorious that the amount paid by purchasers at such sales is uniformly trifling in comparison with the value of the property sold. It has therefore been held, with great propriety, that, to make out a valid title under such sales, great strictness is to be re-

¹Smith v. Cox, 115 Ala. 503. See 72 Iowa 289; Dows v. Dale, 74 Iowa 108; Hunter v. Early, 75 Iowa 769; Snell v. Dubuque & S. C. R. Co., 88 Iowa 442; Paxton v. Ross, 89 Iowa 661; Nicodemus v. Young, 90 Iowa 423; Hintrager v. McElhinny, 112 Iowa 325. But failure to carry forward such delinquent taxes renders a tax-sale voidable only, so that the right to set it aside may become barred by the statute of limitations: Griffin v. Bruce, 73 Iowa 126; Lawrence v. Hornick, 81 Iowa 193. And the failure to carry forward delinquent taxes for prior years will not invalidate a sale for the taxes of subsequent years: Carman v. Harris (Neb.), 85 N. W. Rep. 848. If the sheriff, in returning lands as delinquent for taxes, omits to file a prescribed affidavit, a subsequent sale will be void: McGhee v. Sampselle (W. Va.), 34 S. E. Rep. 815. As to the necessity, as a condition precedent to a sale of land, of a prior exhaustion of personalty, see *ante*, p. 825.

²Dane v. Glennon, 72 Ala. 160; Norris v. Coley, 100 Ga. 547, 553; Hamer v. Weber County, 11 Utah 1, 16.

Where a statutory requirement that the year or years for which taxes remained due and unpaid should be placed upon the tax-books opposite each parcel of land was not complied with, a sale for such taxes was void: Smith v. Callanan, 103 Iowa 218. A sale of land for delinquent taxes of previous years not carried forward on the tax-books as required by the statute is invalid: Cummings v. Easton, 46 Iowa 471; Jiska v. Ringgold County, 57 Iowa 630; Gardner v. Early, 69 Iowa 42; Burke v. Early, 72 Iowa 273; Hooper v. Sac County Bank, 72 Iowa 288; Buckley v. Early,

quired; and it must appear that the provisions of law preparatory to and authorizing such sales have been punctiliously complied with.”¹

In Virginia somewhat stronger language has been employed. “These sales and purchases,” it is said, “founded on forfeitures, deserve no indulgence from the court. It is therefore the well settled law that he who claims under a forfeiture must show that the law has been exactly complied with.”² This language, if strictly taken, is unquestionably more exacting in its requirements than the authorities generally will justify. It is not necessary, we apprehend, in any proceedings so complicated as those in which lands are sold for taxes, that there should be shown an exact and punctilious compliance with all the provisions of law before they can be supported.³ With many of these provisions, as we have endeavored to show in a preceding chapter, the party interested in defeating such a sale could have no concern whatever. They are not made for his protection or benefit, and, whether observed or not, they do not affect his interest. A failure to observe them can, therefore, furnish no ground of complaint on his behalf; and it is not perceived that it can constitute for him any just or equitable protection against the demands of the state for its lawful revenues. It is

¹ *Whitman*, Ch. J., in *Brown v. Veazie*, 25 Me. 359, 362. See *Oliver v. Robinson*, 58 Ala. 46; *Gilchrist v. Shackelford*, 72 Ala. 7; *Donald v. McKinnon*, 17 Fla. 746; *Keene v. Houghton*, 19 Me. 368; *Smith v. Bodfish*, 27 Me. 289; *Flint v. Sawyer*, 30 Me. 226; *Payson v. Hall*, 30 Me. 319; *Matthews v. Light*, 32 Me. 305; *Howe v. Russel*, 36 Me. 115; *Stevens v. McNamara*, 36 Me. 176; *Loomis v. Pingree*, 43 Me. 299; *Lovejoy v. Lunt*, 48 Me. 377; *Williamsburg v. Lord*, 51 Me. 599; *French v. Patterson*, 61 Me. 203; *Benzinger v. Gies*, 87 Md. 704; *Landis v. Vineland Borough*, 61 N. J. L. 424; *Fryer v. Magill*, 163 Pa. St. 340; *Bonnett v. Murdock*, 193 Pa. St. 257; *Eastman v. Gurrey*, 15 Utah 410.

² *Carr*, J., in *Wilson v. Bell*, 7 Leigh 22, 24. And see *Yancey v. Hopkins*, 1 Munf. 419; *Christy v. Minor*, 4

Munf. 431; *Nalle v. Fenwick*, 4 Rand. 585; *Allen v. Smith*, 1 Leigh 231, 254; *Chapman v. Doe*, 2 Leigh 329, 357; *Jesse v. Preston*, 5 Grat. 120; *Martin v. Snowden*, 18 Grat. 100. In California it has been said that the proceedings in these cases are *strictissimi juris*: *Ferris v. Coover*, 10 Cal. 589, 632; *Kelsey v. Abbott*, 13 Cal. 609. In Pennsylvania it is said that the jurisdiction to sell being based on statutory authority, a strict adherence to its mandates must be observed, or the title of the land-owner will not be divested: *Simpson v. Meyers*, 197 Pa. St. 522.

³ It is said in *Textor v. Shipley*, 86 Md. 424, that “it is only necessary that it shall appear that there has been substantial compliance with the law in all of the proceedings of which the sale is the culmination.”

sufficient for his case if the provisions which do concern him have been observed;¹ and if others which are made in the interest of the public are overlooked or disregarded, the public, through its constituted authorities, must be the proper party to complain. This is but reasonable, and this is the rule which is laid down by the authorities.

Onus of proof. At the common law it was necessary that one who claimed to have obtained title to property of another, under proceedings based upon a neglect of public duty, should take upon himself the burden of showing that the duty existed, and had not been performed, and that in the consequent proceedings the law had been complied with by those who had had them in charge. Especially if the proceedings would operate with severity, and be in their effects something in the nature of a forfeiture, the law was strict in its requirement that his evidence should exhibit the proceedings from step to step, and show that each of the safeguards with which the statute had surrounded the delinquent for his protection in this very emergency had been duly observed. And this tenderness for his interests appeared but reasonable. Of what service could it be that safeguards were provided, if observance was not essential; if a careless or incompetent officer might overlook or disregard them with impunity, and deal with the prop-

¹ All provisions of the statute on personalty situated on the land which are designed for or conducive to the protection of persons interested in the land, whether they relate to proceedings before or subsequent to the sale, must be strictly complied with or the sale will be vacated: *Landis v. Vineland Borough*, 61 N. J. L. 424. And, therefore, failure to comply with a statute requiring an officer making sale for taxes to return the warrant of sale within four months renders the sale void: *Ibid.* Under a statute requiring the list of taxes assessed on the land of non-residents and the collector's advertisement of the land for sale to state the amount of taxes assessed thereon, stating in a lump sum the amount of taxes assessed on land and

on personalty situated on the land avoids the sale: *Derry Nat. Bank v. Griffin*, 68 N. H. 183. A tax-deed based on a sale to the county made without a prior offer and re-offer of the land to private holders as the statute requires is void: *Charlton v. Kelly*, 24 Colo. 273. It was held in *Kane's Adm'r v. Garfield's Adm'r*, 60 Vt. 79, that a tax-sale of land was not invalidated by the expending committee's filing with the clerk of the court its original account instead of a certified copy as required by the statute; the statutory purpose was fully answered, as the account presumably remained on file, and notice of its nature was thereby given to all persons interested.

erty of the citizen as if his position as an officer of the government vested him with a dispensing authority over legislation, and authorized him to make, in his discretion, a law for the case as he proceeded?

This rule of the common law has not been modified by decisions, and is still recognized and enforced where statutes have not changed it. It may consequently be said to be the general rule that the party claiming lands under a sale for taxes must show affirmatively that the law under which the sale was made has been substantially complied with, not only in the sale itself, but in all the anterior proceedings.¹ But although the authorities

¹ *Stead's Ex'rs v. Course*, 4 Cranch 403; *Parker v. Rule's Lessee*, 9 Cranch 64; *Williams v. Peyton's Lessee*, 4 Wheat. 77; *McClung v. Ross*, 5 Wheat. 116; *Thatcher v. Powell*, 6 Wheat. 119; *Games v. Stiles*, 14 Pet. 322; *Moore v. Brown*, 11 How. 414; *Pillow v. Roberts*, 13 How. 472; *Early v. Doe*, 16 How. 610; *Parker v. Overman*, 18 How. 142; *Little v. Herndon*, 10 Wall. 26; *Pope v. Headen*, 5 Ala. 433; *Elliott v. Edkins*, 24 Ala. 508; *Wartensleben v. Haithcock*, 80 Ala. 565; *Reddick v. Long*, 124 Ala. 260; *Norris v. Russell*, 5 Cal. 250; *Keane v. Cannovan*, 21 Cal. 291; *Garrett v. Wiggins*, 2 Ill. 335; *Fitch v. Pinckard*, 5 Ill. 69; *Doe v. Leonard*, 5 Ill. 140; *Wiley v. Bean*, 6 Ill. 302; *Irving v. Brownell*, 11 Ill. 402; *Spellman v. Curtenius*, 12 Ill. 409; *Marsh v. Chestnut*, 14 Ill. 224; *Göewey v. Urig*, 18 Ill. 242; *Lane v. Bommelmänn*, 21 Ill. 143; *Charles v. Waugh*, 35 Ill. 315; *O'Brien v. Coulter*, 2 Blackf. 421; *Williams v. State*, 6 Blackf. 36; *Wiggins v. Holley*, 11 Ind. 2; *Gavin v. Shuman*, 23 Ind. 32; *Ellis v. Kenyon*, 25 Ind. 134; *Scott v. Babcock*, 3 Greene (Iowa) 133; *Gaylord v. Scarff*, 6 Iowa 179; *McGahen v. Garr*, 6 Iowa 331; *Durrett v. Stewart*, 88 Ky. 665; *Jones v. Niracle*, 93 Ky. 639; *Pryor v. Hardwick* (Ky.), 22 S. W. Rep. 545; *Polk v. Rose*, 25 Md. 153; *Scott v. Young Men's Soc.*, 1 Doug. (Mich.) 119; *Latimer v. Lovett*, 2 Doug. (Mich.) 204; *Morton v. Reads*, 6 Mo. 64, 9 Mo. 868; *Nelson v. Goebel*, 17 Mo. 161; *Waldron v. Tuttle*, 3 N. H. 340; *Cass v. Bellows*, 31 N. H. 501; *Hawley v. Mitchell*, 31 N. H. 575; *Annan v. Baker*, 49 N. H. 161; *Baxter v. Jersey City*, 36 N. J. L. 188; *Fleischauer v. West Hoboken*, 40 N. J. L. 109; *Woodbridge T'p v. Allen*, 43 N. J. L. 262; *Jones v. Landis T'p*, 50 N. J. L. 374; *Brooks v. Union T'p* (N. J.), 52 Atl. Rep. 238; *Jackson v. Shepard*, 7 Cow. 88; *Atkins v. Kinman*, 20 Wend. 241; *Sharp v. Speir*, 4 Hill 76; *Sharp v. Johnson*, 4 Hill 92; *Newell v. Wheeler*, 48 N. Y. 486; *Westfall v. Preston*, 49 N. Y. 349; *Worth v. Simmons*, 121 N. C. 357; *Hughey's Lessee v. Horrell*, 2 Ohio 233; *Holt's Heirs v. Hemphill's Heirs*, 3 Ohio 232; *Lafferty's Lessee v. Byers*, 5 Ohio 458; *Thompson's Heirs v. Gotham*, 9 Ohio 170; *Kellogg's Lessee v. McLaughlin*, 8 Ohio 114; *Kelly v. Medlin*, 26 Tex. 48; *Hall v. Collins*, 4 Vt. 316; *Bellows v. Elliott*, 12 Vt. 569; *Brown v. Wright*, 17 Vt. 97; *Cummings v. Holt*, 56 Vt. 384. Where a finding that "all steps required by law to be taken by the county auditor and treasurer and other officers had been performed by such officers" was not supported by any fact found, it was

concur in this rule with great unanimity, they are not so entirely in accord when the question regards the strictness required in the showing that shall be made. On this point some of the cases, particularly those which were decided at a very early day, have used language importing a strictness greater than in most cases it would be possible to comply with, and greater than is demanded by any considerations of policy or of justice to the party whose estate is in question. The later cases lay down a more just and reasonable rule, and warrant us in saying that the requirement of a compliance with the law, when the question arises as one of title, is satisfied by obedience to those provisions of the law which are in the nature of conditions to the power to sell, and are not merely *directory* under the rules laid down in another chapter.¹ To require more than

not sufficient to sustain a tax-title: *Mattox v. Stephens*, 140 Ind. 282. Where the statute requires a demand before sale, the fact of demand is not proved by the recitals in a tax-deed: *Lathrop v. Hawley*, 50 Iowa 39. It devolves upon a tax-sale purchaser to show that the property was advertised as required by the statute: *Johnson v. Harper*, 107 Ala. 706.

¹See ch. IX, *ante*. In reference to the authority of a sheriff to sell lands for taxes in North Carolina, the cases have been summed up thus: "As a general rule, the power of the sheriff, being a naked power uncoupled with any estate of his own, is strictly construed, so that he must conform, in its execution, to the terms of the statute which creates and confers it. But still the main object of the law being to raise revenue for the state, the courts will not exact such a rigid observance of forms as will defeat such primary purpose, but will apply to sales for taxes the same reasonable rules of construction as govern sales under execution for private debts. . . . Innocent purchasers are protected; that is, those who did not, and could

not, because of their want of opportunity, know whether the prerequisites to the sale had been complied with or not. But when the violation of the law is known to the purchaser, and more especially when he has procured it, he will receive no protection from the law, and can take no benefit from his purchase. Such a person is not permitted to say that that which the law requires him to do is unimportant in itself, and merely directory, but he must do all the law enjoins upon him, and do it in the manner and at the time prescribed; and doubly incumbent is this duty upon him, if prejudice to another can be the result of failure or delay on his part." So the purchaser's failure to obey the statute, and to pay immediately to the sheriff the purchase-money, and to take from him after its registration a receipt, will avoid the sale: *Hays v. Hunt*, 85 N. C. 303. It was held in *Harman v. Steed*, 49 Fed. Rep. 779, that the mere failure of the county clerk to record, as required by statute, the delinquent list filed in his office, does not affect the validity of a subsequent sale for taxes, since a compliance with prior statutory re-

this would be needless for any beneficial purpose, and would greatly embarrass, and in innumerable cases defeat, the collection of the revenue.

The requirement that the claimant under a tax-sale should show the proceedings to have been regular was entirely according to the natural order of evidence. The original owner would show a *prima facie* right by producing the documents and evidence which demonstrated his original ownership. To overcome this, there must be evidence of a title overriding or extinguishing it; and such a title would not appear in the tax purchaser until the successive steps, taken in compliance with the tax-law, and ending in a sale and conveyance, had been shown. To prove merely a sale would be futile, unless the power to make the sale was established; and to prove merely an instrument purporting to be a conveyance would be even more idle.

Nor was there any special injustice or hardship in the rule of the law which required the tax purchaser to prove the regularity of the proceedings under which he claimed. Whether the interest of the state might not be best subserved by casting the *onus* of showing defects in the title on the adverse claimant, and whether, therefore, on grounds of public policy, it might not be advisable to change the rule accordingly, are questions that stand quite apart from any which concern the claims or rights of the purchaser; but regarding his position only, there was no hardship in calling upon him to give proof of his title by showing a sale made with due authority. A tax-sale is the culmination of proceedings which are matters of record; and it is a reasonable presumption of law that, where one acquires rights which depend upon matters of record, he first makes search of the record in order to ascertain whether anything shown thereby would diminish the value of such rights, or tend in any contingency to defeat them.¹ A tax purchaser

quirements fully answers the purpose of giving notice to the state and the land-owner, and the record is only intended for the purpose of preserving the list. And in *Auditor-General v. Keweenaw Assoc.*, 107 Mich. 405, the county treasurer's failure to attach a certificate of correctness to

his transcript of delinquent taxes did not avoid a tax-sale where, under the statute, sales were not predicated on such transcript.

¹That the proceedings on which tax-sales depend are to be proved by the records, or by the originals from which the records should be made

consequently cannot be, in any strict technical sense, a *bona fide* purchaser, as that term is understood in the law;¹ because

up, the following cases are authority, if indeed any is necessary: *Games v. Stiles*, 14 Pet. 322; *Martin v. Barbour*, 34 Fed. Rep. 701, 104 U. S. 634; *McRory v. Maines*, 47 Ga. 90; *Miner v. McLean*, 4 McLean 138; *McGee v. Fleming*, 82 Ala. 276; *Martin v. Allard*, 55 Ark. 218; *Logan v. Eastern Ark. L. Co.*, 68 Ark. 248; *Salinger v. Gunn*, 61 Ark. 414; *Job v. Tebbetts*, 10 Ill. 376, 380; *Graves v. Bruen*, 11 Ill. 431, 442; *Schuyler v. Hull*, 11 Ill. 462, 465; *Bucksport v. Spofford*, 12 Me. 487; *Boston v. Weymouth*, 4 Cush. 538; *Adams v. Mack*, 3 N. H. 493, 499; *Blake v. Sturtevant*, 12 N. H. 567; *Pittsfield v. Barnstead*, 40 N. H. 477, 493; *Sheldon's Lessee v. Coates*, 10 Ohio 278; *Thevenin v. Slocum*, 16 Ohio 519, 531; *Gearhart v. Dixon*, 1 Pa. St. 224; *Diamond Coal Co. v. Fisher*, 19 Pa. St. 267; *Blodgett v. Holbrook*, 39 Vt. 336; *McLain v. Batton*, 50 W. Va. 121; *Iverslie v. Spaulding*, 32 Wis. 394. See *ante*, pp. 576, 577. But such records do not import absolute verity like those of courts, and it may be shown in contradiction to their recitals that the facts were otherwise than as there stated: *Graves v. Bruen*, 11 Ill. 431, 443; *Tebbetts v. Job*, 11 Ill. 453; *Schuyler v. Hull*, 11 Ill. 462, 465; *Boston v. Weymouth*, 4 Cush. 538, 541; *Blake v. Sturtevant*, 12 N. H. 567; *Diamond Coal Co. v. Fisher*, 19 Pa. St. 267, 273. Compare *ante*, pp. 506-509. In *Kellogg v. McLaughlin*, 8 Ohio 114, 116, the record of tax proceedings was held to be conclusive against the party claiming under a tax-sale, but not against the party contesting it. In *Miner v. McLean*, 4 McLean 138, 140, it is said that "parol evidence is not admissible to supply a defect in the record. This well-established

rule can admit of no exception." See *Blanchard v. Powers*, 42 Mich. 619; *Gamble v. East Saginaw*, 43 Mich. 367; *State v. Crookston Lumber Co.* (Minn.), 89 N. W. Rep. 173; *Comfort v. Ballingal*, 134 Mo. 281; *Jones v. Landis T'p*, 50 N. J. L. 374; *Iverslie v. Spaulding*, 32 Wis. 394. Where an affidavit of publication of the notice of a tax-sale is required by statute to be filed and preserved, it is the only evidence admissible of the facts required to be stated therein, and cannot be supplemented by parol evidence: *Rustin v. Merchants', etc. Co.*, 23 Colo. 351. In *Salinger v. Gunn*, 61 Ark. 414, it was held that the record which furnishes the evidence of the amount of taxes, penalty, and costs for which each parcel of land is sold is the clerk's record made after the sale and not that made before sale; and the showing made by such record cannot be contradicted by parol. And in *Martin v. Allard*, 55 Ark. 218, parol evidence was not allowed to supply the absence from the record of certain proof of publication—viz, the certificate of the clerk of the county court—which the statute requires to precede a sale. In *Coit v. Wells*, 2 Vt. 318, it was decided that the records of the advertisements in the case of road taxes were not evidence at all unless they contained all the particulars required by the statute. These cases, however, are not inconsistent with a resort to parol evidence as secondary to that of record when the latter is lost or destroyed. See *McGee v. Fleming*, 82 Ala. 276; *Duggan v. McCullough*, 27 Colo. 43; *Davis v. Harrington*, 35 Kan. 39; *Cooper v. Holmes*, 71 Md. 20. Parol evidence is held admis-

¹ *American Inv. Co. v. Beadle County*, 5 S. D. 410.

a *bona fide* purchaser is one who buys an apparently good title without notice of anything calculated to impair or affect it; but the tax purchaser is always deemed to have such notice when the record shows defects. He cannot shut his eyes to what has been recorded for the information of all concerned, and, relying implicitly on the action of the officers, assume what they have done is legal because they have done it. It is indeed a presumption of law that official duty is performed; and this presumption stands for evidence in many cases; but the law never assumes the existence of jurisdictional facts; and throughout the tax proceedings the general rule is, that the taking of any one important step is a jurisdictional prerequisite to the next; and it cannot therefore be assumed, because one is shown to have been taken, that the officer performed his duty in taking that which should have preceded it.¹ The tax purchaser buys, therefore, under the operation of the rule *caveat emptor*,² and under common-law rules would get nothing unless he got the land itself;³ but undoubtedly he has an equity,

sible in Illinois to establish the publication of a list of delinquent lands where the certificate of publication which had been filed was defective: *Lingle v. Chicago*, 172 Ill. 170; *McChesney v. People*, 178 Ill. 452.

¹ *Merrill v. Shields*, 57 Neb. 78.

² *Hussman v. Durham*, 165 U. S. 144; *Martin v. Barbour*, 34 Fed. Rep. 701; *Larimer v. National State Bank*, 11 Colo. 564; *Gage v. Eddy*, 186 Ill. 432; *McWhinney v. Indianapolis*, 98 Ind. 182; *State v. Casteel*, 110 Ind. 174; *Worley v. Cicero*, 110 Ind. 208; *Sullivan v. Davis*, 29 Kan. 28; *Hamilton v. Valiant*, 30 Md. 139; *Croskerry v. Busch*, 116 Mich. 288; *Pennock v. Douglas County*, 39 Neb. 293; *Adams v. Osgood*, 42 Neb. 450; *Norris v. Burt County*, 56 Neb. 295; *McCague v. Omaha*, 58 Neb. 37; *Martin v. Kearney County (Neb.)*, 87 N. W. Rep. 351; *Perham v. Haverhill Fibre Co.*, 64 N. H. 485; *Casselbury v. Piscataway*, 43 N. J. L. 353; *Tyler v. Cass County*, 1 N. D. 369; *Lee v. Crawford County (N. D.)*, 88 N. W.

Rep. 97; *Hamer v. Weber County*, 11 Utah 1, 16; *Phelps v. Tacoma*, 15 Wash. 367. The rule of *caveat emptor* applies as well to sales under street assessments as to sales for taxes generally: *Churchman v. Indianapolis*, 110 Ind. 259.

³ In the absence of an express statute the purchaser at a tax-sale of land cannot recover the money paid by him where the sale proves ineffectual: *Nevada County v. Dickey*, 68 Ark. 160; *Hilgenburg v. Marion County Com'rs*, 107 Ind. 494; *State v. Casteel*, 110 Ind. 174; *Lindsey v. Boone County*, 92 Iowa 86; *Croskerry v. Busch*, 116 Mich. 288; *Norris v. Burt County*, 56 Neb. 295; *Martin v. Kearney County (Neb.)*, 87 N. W. Rep. 351; *Tyler v. Cass County*, 1 N. D. 369; *McCormick v. Edwards*, 69 Tex. 106; *Phelps v. Tacoma*, 15 Wash. 367. This is so, even though the taxes were lawfully assessed and were paid by his purchase: *McCormick v. Edwards*, 69 Tex. 106. Nor, in the absence of statute, can the

in the event of his title failing, to be reimbursed for his expenditure,¹ and for this the legislature in a number of the states has deemed it proper to make provision. The provisions made differ greatly and it is impracticable to state them here.² Con-

purchaser at a void tax-sale recover money paid by him to redeem land from a former sale to the state: *Ibid.* A tax-purchaser whose title fails because the collector failed to give notice of sale has no remedy against the collector: *Hamilton v. Valiant*, 30 Md. 139; *Sullivan v. Davis*, 29 Kan. 28; *Casselbury v. Piscataway*, 43 N. J. L. 353. Neither has he for any error or irregularity which defeats his title a remedy against the town: *Lynde v. Melrose*, 10 Allen 49. And see *Jenks v. Wright*, 61 Pa. St. 410, 414. Nor, unless the statute gives it, can he recover against a municipality for the taxes or special assessments of which the sale was made: *Loomis v. Los Angeles County*, 59 Cal. 456; *Worley v. Cicero*, 110 Ind. 203; *Pennock v. Douglas County*, 39 Neb. 293; *Merrill v. Omaha*, 39 Neb. 304; *McCague v. Omaha*, 58 Neb. 37; *Budge v. Grand Forks*, 1 N. D. 309; *American Inv. Co. v. Beadle County*, 5 S. D. 410. Nor can a tax-purchaser whose title fails have the defective tax proceedings corrected in equity; there being no element of contract in the case as between him and the land-owner: *Cogburn v. Hunt*, 56 Miss. 718. See *Logansport v. Humphrey*, 84 Ind. 467; *McWhinney v. Indianapolis*, 98 Ind. 182. Lapse of time will not aid him unless he takes possession under his purchase: *Coxe v. Deringer*, 78 Pa. St. 271. A special agreement made by the board of supervisors at the time of a tax-sale to refund the money if the sale proves defective is *ultra vires* and void: *Hyde v. Supervisors*, 43 Wis. 129.

¹ *Forqueran v. Donnally*, 7 W. Va. 114.

² See *Stutsman County v. Wallace*,

142 U. S. 293, reversing *Wallace v. Stutsman County*, 6 Dak. 1; *Flint v. Republic County Com'rs*, 27 Fed. Rep. 850; *Hayes v. Los Angeles County*, 99 Cal. 74; *Hurd v. Hamill*, 10 Colo. 174; *Hilgenburg v. Marion County Com'rs*, 107 Ind. 494; *State v. Casteel*, 110 Ind. 174; *Worley v. Cicero*, 110 Ind. 174; *Millikan v. La Fayette*, 118 Ind. 323; *Ball v. Barnes*, 123 Ind. 394; *Van Schaac v. Robbins*, 36 Iowa 201; *Ellis v. Peck*, 45 Iowa 112; *Bowen v. Duffie*, 66 Iowa 88; *Storm Lake Bank v. Buena Vista County*, 66 Iowa 128; *Lindsey v. Boone County*, 92 Iowa 86; *Lonsdale v. Carroll County*, 105 Iowa 452; *Corbin v. Young*, 24 Kan. 198; *Hoffman v. Groll*, 35 Kan. 632; *Geer v. Thrasher*, 37 Kan. 657; *Rork v. County Com'rs*, 46 Kan. 175; *Fishel v. Mercier*, 37 La. An. 356; *State v. Kannon*, 44 La. An. 734; *Lynde v. Malden*, 166 Mass. 244; *People v. Auditor-General*, 30 Mich. 12; *Auditor-General v. Bay Supervisors*, 106 Mich. 662; *Auditor-General v. Patterson*, 122 Mich. 39; *Gurd v. Auditor-General*, 122 Mich. 151; *Easton v. Hayes*, 35 Minn. 418; *State v. Dressel*, 38 Minn. 90; *Corbin v. Morrow*, 46 Minn. 522; *State v. Bruce*, 50 Minn. 491; *State v. Olson*, 58 Minn. 1; *State v. Norton*, 59 Minn. 424; *Flanagan v. St. Paul*, 65 Minn. 347; *Wilkinson County Supervisors v. Fitts*, 63 Miss. 600; *Sullivan v. Donnell*, 90 Mo. 278; *Bingham v. Delougherty (Mo.)*, 13 S. W. Rep. 208; *Gregg v. Jesberg*, 113 Mo. 34; *Roberts v. Adams County*, 18 Neb. 471, 20 Neb. 409; *Wilson v. Butler County*, 26 Neb. 676; *Fuller v. Colfax County*, 33 Neb. 716; *Alexander v. Overton*, 52 Neb. 283; *Norris v. Burt County*, 56 Neb. 295;

ditions imposed by the statute must be complied with or no right of recovery will arise.¹ Where the statute provides for refunding to a purchaser whose title fails, the right as to existing sales cannot be taken away by a subsequent statute.² It may be added that the proceeding to have the amount paid at a tax-sale refunded is not judicial in its nature, and the duties imposed by the statute may be performed by other than judicial officers.³

Presumptions of regularity. When the tax purchaser is left to make his showing, the strictness required in the proof may reasonably be made to depend, to some extent, upon the circumstances. Presumptions are indulged in every class of

Grant v. Bartholemew, 57 Neb. 673, 58 Neb. 839; *McCague v. Omaha*, 58 Neb. 37; *Merrill v. Ijames*, 58 Neb. 706; *Martin v. Kearney County (Neb.)*, 87 N. W. Rep. 351; *People v. Chapin*, 104 N. Y. 96, 369, 105 N. Y. 309, 109 N. Y. 177; *Clarke v. New York*, 111 N. Y. 621; *Coffin v. Brooklyn*, 116 N. Y. 159; *McFarlane v. Brooklyn*, 122 N. Y. 585; *Reid v. Albany County Supervisors*, 128 N. Y. 364; *People v. Roberts*, 151 N. Y. 540; *Richmond & D. R. Co. v. Reidsville*, 109 N. C. 494; *Tyler v. Cass County*, 1 N. D. 369; *Iowa, etc. Land Co. v. Barnes County*, 6 N. D. 601; *Van Nest v. Sargent County*, 7 N. D. 139; *Paine v. Dickey County*, 8 N. D. 581; *Johnson v. Stewart*, 29 Ohio St. 498; *Chapman v. Sollars*, 38 Ohio St. 378; *Erickson v. Brookings County*, 3 S. D. 434; *Phelps v. Tacoma*, 15 Wash. 367; *Gove v. Tacoma (Wash.)*, 67 Pac. Rep. 261; *Edwards v. Upham*, 93 Wis. 455; *Pier v. Oneida County*, 102 Wis. 338. A statute providing that "taxes erroneously assessed or illegally collected may, by the order of the board of supervisors, be refunded by the county treasurer" does not authorize a recovery by one who has bought at a tax-sale, even though the land was not subject to taxation: *Brooks v. Tulare County*, 117 Cal.

465. By refunding subsequent taxes required to be paid by a purchaser at a tax-sale the state does not lose its lien on the property for them: *Auditor-General v. Patterson*, 122 Mich. 39. Nor does the refunding to a purchaser whose tax-title has been held void preclude the subsequent collection of the taxes against the owner: *State v. Murphy*, 81 Minn. 254. A statute providing for the cancellation of invalid tax-sales and the refunding to purchasers what they have paid is not for the original owner's benefit, and he cannot apply to have the sale set aside: *People v. Roberts*, 151 N. Y. 540, citing *People v. Chapin*, 104 N. Y. 369. That former owner cannot object to proceedings to refund, see *State v. Dressel*, 38 Minn. 90. As to the lien of a purchaser at a tax-sale when his title fails, see the conclusion of this chapter; also ch. XVII.

¹ *Bingham v. Delougherty (Mo.)*, 13 S. W. Rep. 208, following *Sullivan v. Donnell*, 90 Mo. 278.

² *Corbin v. Washington County Com'rs*, 3 Fed. Rep. 356; *Fleming v. Roverud*, 30 Minn. 273; *State v. Foley*, 30 Minn. 350; *Paine v. Dickey County*, 8 N. D. 581.

³ *State v. Dressel*, 38 Minn. 90.

proceedings; and in some cases presumptions may give an efficient support to evidence which, without them, would be insufficient to establish the necessary facts. Indeed, in some cases presumptions may supply links which appear to be missing in the testimony. It was once said by an eminent judge in a tax case, that "full evidence of every minute circumstance ought not, especially at a distant day, to be required. From the establishment of some facts it is possible that others may be presumed, and less than positive testimony may establish facts."¹ Nothing, under some circumstances, could be more just or reasonable. But when that "distant day" arrives, when presumptions are relied upon, it will be found necessary to observe, with some circumspection, what has been the position of the parties, relative to the property claimed, from the time the sale was made. That position may sometimes very reasonably have a controlling influence. If the tax purchaser has made no claim under his title, and has left the original owner to treat the property as his own, it is difficult to understand on what ground any presumption can be built up in aid of the tax-title, deriving its force from the lapse of time. "The older it is without any claim being made under it, the weaker it is, and the weaker are all presumptions in its favor."² If, on the other hand, he has made claim in practical and effective form by taking possession, and especially if, after the possession was taken, the other party, with full knowledge thereof, has neglected for any considerable period to assert his own

¹ *Marshall*, Ch. J., in *Stead's Ex'rs v. Course*, 4 Cranch 403. See, to the same effect, *Freeman v. Thayer*, 33 Me. 76. The fact that a deed was given may be presumed after forty years' time, if the known facts are consistent with it: See *Earley v. Euwer*, 102 Pa. St. 338. Sale made in 1843 presumed to have been regular and valid where the question was not raised until 1890, no claim having since been made by the original owner or any one claiming under him: *Lasher v. McCreery*, 66 Fed. Rep. 834. It was held in *Talfener v. Dillard*, 70 Tex. 139, that the mere lapse of forty years is not sufficient

to raise a presumption that laws regulating assessment and sale for taxes have been complied with, so as to supply the lack of proof of the sheriff's power to convey legal title by the deed; no proof being offered of such facts as would be presumed to be in the custody of the proper officers and departments, nor any evidence of the loss thereof.

² *Alexander v. Bush*, 46 Pa. St. 62. See, to the same effect, *Read v. Good-year*, 17 S. & R. 350; *Hole v. Rittenhouse*, 19 Pa. St. 305; *Worthing v. Webster*, 45 Me. 270; *Richardson v. Dorr*, 5 Vt. 9; *Townsend v. Downer*, 32 Vt. 183.

rights, it must be conceded that the claim of the tax purchaser will come before the courts under circumstances entitling it to much greater indulgence.

The reasons for this are manifest. If one who claims to have title to property shall lie by for a long term of years without asserting it, while another is in the enjoyment of that which, if the title is valid, should be enjoyed by himself, it is not a very violent presumption that his supineness is because he is well aware of some defect which would defeat his claim if he were to assert it in legal proceedings. The longer he delays the stronger this presumption becomes; and if the time could ever arrive when, because the claim is old, it could be presumed without defects, it is obvious that it could only be on an indulgence of presumptions that are opposed to reason. That he may lie by because of defects, until the time can arrive when, because of his lying by, it will be presumed that no defects exist, and then be put by the law in possession of that which it is inferable he did not venture to demand before, because he knew or had reason to believe the demand would be ineffectual, is an absurdity so manifest that time need not be wasted in the attempt to make it appear more so.

It is different when the tax purchaser has been in possession.¹ That fact is some evidence that he at least believes his title to have validity; and if those who might dispute it neglect to do so, the inferences will be more or less strong, according to the circumstances, that their action is attributable to the belief that a contest must be ineffectual. It is doubted if in any case, on common-law principles, a tax-title could be presumed valid before the full period allowed by the statute of limitations for bringing suit had expired. The court of appeals of Virginia

¹ Possession, recovery against the grantor of defendant in trespass, and payment of taxes, are evidence in favor of a tax-deed thirty years old that a surplus bond, the cost of which is recited in the deed, was given: *Lackawanna Iron, etc. Co. v. Fales*, 55 Pa. St. 90. As to the force, generally, of recitals in deeds where there has been possession under them, see *Worthing v. Webster*, 45 Me. 270. A

tax-title, though it may be inherently void, must be considered valid until judicially investigated and pronounced null; and an officer in making an assessment may act upon it as *prima facie* valid: *Prescott v. Payne*, 44 La. An. 650. Validity of tax-titles presumed where no evidence as to their validity was offered: *Allen v. Dayton Hotel Co.*, 95 Tenn. 480.

decided at an early day that it could not be,¹ and no satisfactory reason has been suggested in any quarter to cast a doubt upon the correctness of this conclusion. Still, presumptions may be very forcible in some cases, where, on the evidence, it is left in doubt whether the tax proceedings have or have not been conducted in conformity to law. If possession has been held under them for a considerable period, though it may not have been for a length of time sufficient to bar suits for the recovery of lands, there may reasonably spring from such possession an inference in favor of legality, of sufficient force to turn the scales on any point left in doubt on the proofs, and to justify a jury, to whom the case is submitted, in drawing the conclusion which supports the possession. The longer the possession has continued, the stronger should be the intendments in favor of the title under which it is held; and although these cannot make valid that which in itself is void, they may, and should, be allowed their weight when a case is to be determined which the evidence has left in doubt. What their weight should be must depend on the circumstances; there can be no definite rule of law on the subject which can be applied in all cases.²

¹ *Allen v. Smith*, 1 Leigh 231, 254. The validity of a tax-sale is not to be presumed from the mere deed of the collector, unaccompanied by extrinsic evidence that the proceedings were regular. Nor, in an action of ejectment, will any presumptions be made in favor of the validity of the deed, merely because the party claiming it proves a possession adverse to the title of another party, but for a period short of the statute of limitations: *Townsend v. Downer*, 32 Vt. 183.

² Five years' possession does not warrant a finding in favor of the regularity of proceedings, when their correctness is not shown by the evidence: *Phillips v. Sherman*, 61 Me. 548. See *Pejepscut Proprietors v. Ransom*, 14 Mass. 145. As to what will be overlooked in Pennsylvania under the statute which declares

that no irregularities in the assessment, process, or otherwise shall be allowed to affect the title of the purchaser, see *Laird v. Hiester*, 24 Pa. St. 452. As to the force of the presumption in favor of the correctness of official action under that statute, see *Cuttle v. Brockway*, 24 Pa. St. 145; *Heft v. Gephart*, 65 Pa. St. 510. In *Schoff v. Gould*, 52 N. H. 512, the tax proceedings depended on the vote of a meeting, and the question was made upon proof of the warrant for holding it. The court says: "The meeting was held in March, 1841,—more than thirty years ago,—and officers were chosen who acted as such, and the jury might have presumed that the warrant remained posted the requisite time. See *Bishop v. Cone*, 3 N. H. 513; *Northwood v. Barrington*, 9 N. H. 373; *Petersborough v. Lancaster*, 14 N. H. 372; *School*

Presumptions could in no case supply the want of a record when the law requires one, and it has never been made; neither can they help out a record which is so defective as not to answer the requirements of the law.¹ But when it has been once made to appear that a record has existed which is now lost or destroyed, presumptions may justly be allowed great weight in support of the secondary evidence, in proof of the contents of the record, and that it was in compliance with the law.²

District v. Bragdon, 23 N. H. 514. In *Cavis v. Robertson*, 9 N. H. 524, it was held that this rule did not apply where the facts were recent and the records might be amended, but would apply where, from the lapse of time, it may be presumed that the officers who made the records are no longer living, or have no recollection of the facts. It does not appear that the officers who made the records are dead, but it is a fair presumption that they have lost recollection of the fact that the notice remained posted." A tax-deed coupled with possession may be sufficient to preclude mere trespassers from contesting the right to possession: *Van Auken v. Monroe*, 38 Mich. 725. The presumption under the North Carolina statute that at a sale for taxes the sheriff complies with all the requirements of the law, arises only after a deed has been executed by him: *Tucker v. Tucker*, 110 N. C. 333. Where an officer empowered to do so has changed the descriptions of property in the assessment book, and the change has been followed in subsequent proceedings, the presumption must be that the officer's act was warranted: *Beeson v. Johns*, 59 Iowa 166. The following cases are important as showing what, under their varying circumstances, was held sufficient evidence of an assessment: *Bratton v. Mitchell*, 7 W. & S. 259; *Crum v. Burke*, 25 Pa. St. 377, 381; *Heft v. Gephart*, 65 Pa. St. 510; *McDermott v. Hoffman*, 70 Pa. St. 31;

McReynolds v. Longenberger, 57 Pa. St. 13; *Pittsfield v. Barnstead*, 40 N. H. 477. The sale-book does not prove an assessment: *Bratton v. Mitchell*, 1 W. & S. 310. Neither do the recitals in the tax-warrant: *Hoffer v. Matteson's Ex'rs*, 16 N. J. Eq. 382. Where a statute provides that in the town clerk's absence a justice of the peace may take his place in certain tax proceedings, there can be no presumption that the justice failed to make any necessary qualification: *First Nat. Bank v. St. Joseph*, 46 Mich. 526. As to the requisites, in general, of a valid sale, see *Fischel v. Mercier*, 32 La. An. 704; *Virden v. Bowers*, 55 Miss. 1; *Coleman v. Shattuck*, 62 N. Y. 348.

¹ *Porter v. Byrne*, 10 Ind. 146; *Moser v. White*, 29 Mich. 59; *Mills v. Richland T'p*, 72 Mich. 100; *Harding v. Bader*, 75 Mich. 316; *Muskegon v. Martin Lumber Co.*, 86 Mich. 625; *Kellogg v. McLaughlin*, 8 Ohio 114; *Coit v. Wells*, 2 Vt. 318; *Capron v. Raistrick*, 44 Vt. 515.

² Where a record is not found in the proper office, and it is not shown that one ever was in existence, there is at the common law no presumption that one was made: *Hall v. Kellogg*, 16 Mich. 135. See *Gibson v. Bailey*, 9 N. H. 168; *Cavis v. Robertson*, 9 N. H. 524; *Cass v. Bellows*, 31 N. H. 501. But this rule may be changed by statute: *Redding v. Lamb*, 81 Mich. 318; *Benedict v. Auditor-General*, 104 Mich. 269. And it is held in Arkansas that the fact

Special authority to sell. The various proceedings which usually are required to precede a sale of the lands have been successively mentioned. Whether, when these have been taken, the officer will require any special warrant or process as his authority for proceeding to a sale, must depend upon whether something of that nature is provided for by law. In some of the states a list of delinquent lands is made out and properly certified by the state auditor, or some other designated officer of the state, to whom the returns of delinquent taxes have been made, and this list is transmitted to the county or township official who by law is intrusted with the duty of making sales, and constitutes his warrant for doing so. In other states the statutes make other special provisions for the purpose. Whatever list, certificate, or warrant is prescribed by the statute is to be looked upon as in the nature of process, and it is indispensable that the officer should have it before taking any steps towards making a sale.¹ And in all his action he must keep within the command of his warrant and of the law; for his authority will fail to support him when he fails to observe it.²

that an assessment roll cannot be found in the office where the law requires it to be kept does not establish the fact that it was not regularly filed there: *Jayner v. Harrison*, 56 Ark. 276. In an action to enforce a tax-title it will be presumed that a tax-roll was filed with the clerk of the court in the time prescribed by law, when the evidence does not show the contrary: *Gwynn v. Richardson*, 65 Miss. 222. And in *Cook v. Schroeder Lumber Co.* (Minn.), 88 N. W. Rep. 971, the fact that no affidavit of the posting of notice of a tax-sale was found with the files and records was held not to be evidence rebutting the recitals of the tax-certificate that the notice was duly given.

¹ *Martin v. Barbour*, 140 U. S. 634; *Miner v. McLean*, 4 McLean 138; *Gossett v. Kent*, 19 Ark. 602; *Martin v. Allard*, 55 Ark. 218; *Highlands v. Johnson*, 24 Colo. 371; *Neff v. Smyth*, 111 Ill. 100; *Bell v. Johnson*, 111 Ill.

374; *Ogden v. Bemis*, 125 Ill. 105; *Ames v. Sankey*, 128 Ill. 523; *People v. Henckler*, 137 Ill. 580; *Glos v. Randolph*, 138 Ill. 268; *Kepley v. Fouke*, 187 Ill. 162; *Sankey v. Seipp*, 27 Ill. App. 299; *Langohr v. Smith*, 81 Ind. 495; *Trainor's Succession*, 27 La. An. 150; *Kipp v. Collins*, 33 Minn. 394; *Homer v. Cilley*, 14 N. H. 85; *Kelly v. Craig*, 5 Ired. 129; *Hannel v. Smith*, 15 Ohio 134; *Morrow v. Smith* (Okl.), 61 Pac. Rep. 366. Where an auditor certifies for sale land delinquent for taxes to the sheriff of a county in which such land was not situated at the time of the certificate, a sale and subsequent deed are void: *White v. Wilkinson* (W. Va.), 41 S. E. Rep. 136. See *Collins v. Storm*, 75 Iowa 36.

² A statute authorizing a tax-collector to sell property sold or forfeited to the state does not empower him to sell a delinquent taxpayer's property in satisfaction of taxes due the state: *Prescott v. Payne*, 44 La.

If a special demand for the tax is required to be made before a sale, such demand must be made to appear or a sale will be invalid.¹

Notice of sale. The first proceeding usually required of the officer who is to make sale is, that he shall give public notice of his intention to do so.² Under different statutes notices in various forms are required, as may be thought most suitable to the case. If the statute fails to specify the character of the notice, doubtless one in writing must be intended;³ but a provision so indefinite will not often be met with. Unusual care is required in obeying the directions of the statute regarding notice, as no one who is entitled to notice can be bound by a sale which has been made without it. There is no constitutional provision entitling one to notice in a particular mode; what the statute has made sufficient must be deemed so. In the case of residents, personal notice is sometimes provided for;⁴ but for non-residents or unknown owners, a notice pub-

An. 650. A sale of unseated or unimproved land as seated or improved is void, and passes no title to the purchaser: *Preswick v. McGrew*, 107 Pa. St. 43; *Holloway v. Jones*, 143 Pa. St. 564. Where, by the statute, the proceedings in the case of non-residents differ from those in the case of residents, the subsequent proceedings will be invalid unless they follow the assessment: *Merrick v. Hutt*, 15 Ark. 331; *Kinsworthy v. Mitchell*, 21 Ark. 145; *McDermott v. Scully*, 27 Ark. 226; *Garabaldi v. Jenkins*, 27 Ark. 453.

¹ *Lathrop v. Hawley*, 50 Iowa 39.

² Notice is not required of a private sale of lands previously noticed for public sale at which they were not sold: *Newton v. Raper*, 150 Ind. 630.

³ *Pearson v. Lovejoy*, 53 Barb. 407.

⁴ Leaving notice at one's domicile is not personal service: *Peyrie v. Schreiber*, 66 Mo. 38. Notice should be given to the present owner, and not to a former one to whom the property may have been assessed: *Adolph v. Richardson*, 52 La. An. 1156;

Geddes v. Cunningham, 104 La. An. 306. Under a statute requiring notice to be served on the owner or his agent, or left at his residence, a notice addressed to his estate and left at his former residence, he being dead, his estate settled, and the land in possession of his heir's vendees, confers no jurisdiction to order a sale: *Carlisle v. Watts*, 78 Ala. 486. See *Hoyle v. Southern Athletic Club*, 48 La. An. 879; *Genella v. Vincent*, 50 La. An. 956; *Benzinger v. Gies*, 87 Md. 704. Necessity of showing search for owner, his heirs, or persons in adverse possession: *Morse v. South*, 80 Fed. Rep. 206. The owner of land at the time the assessment is made is the person to whom, under the New Jersey statute, a copy of the notice of sale should be mailed: *Jones v. Landis T'p*, 50 N. J. L. 374. Where two or more persons own land in common, and the statute requires notice to owners, if one is omitted a sale is void: *Howze v. Dew*, 90 Ala. 178; *Thurston v. Miller*, 10 R. L. 358.

lished in a newspaper is generally all that is prescribed.¹ Sometimes the published notice is all that is made requisite even in the case of residents,² while other statutes direct that the tax-list shall be kept posted in some public place or places for a certain period.³ Whatever the provision is, it must be complied with strictly.⁴ This is one of the most important of

A lessee under a lease for ninety-nine years is a proper person on whom tax-bills and notices of sale should be served: *Textor v. Shipley*, 86 Md. 424. In North Carolina, prior to the act of 1891, the mortgagee as the legal owner of the land was entitled to the notice of sale required to be given to the owner: *Whitehurst v. Gaskill*, 68 N. C. 449; *Hill v. Nicholson*, 92 N. C. 24. See *Woody v. Jones*, 113 N. C. 253.

¹ The owner of unseated lands is only entitled to such notice as the statute shall provide for, and he must at his peril take notice of the tax proceedings: *Cuttle v. Brockway*, 32 Pa. St. 45. Under a statute providing that notice to delinquent taxpayers may be served by publication on "unknown owners," such an owner is one who has no agent to represent him, and whose place of business, residence, and postoffice address are not known to the tax-collector: *Webre v. Lutzer*, 55 La. An. 574. See *McPhee v. Constable*, 77 Ga. 772. Where the collector certifies that he addressed the notice to the delinquent non-resident taxpayer to a certain postoffice, it may be shown that such postoffice was not at his residence: *Montgomery v. Marydale, etc. Co.*, 46 La. An. 403.

² The legislature has power to determine what shall be sufficient to bring parties into court in tax cases, and if a published notice is provided for and given, that is sufficient: *New Orleans v. Cordeviolle*, 10 La. An. 732; *Drainage Co. Cases*, 11 La. An. 338. And a sale of land for delinquent

taxes on notice by advertisement under the statute of 1884 passes the delinquent's title whether he is a resident or not, if the assessment is valid: *In re Lake*, 40 La. An. 142; *In re Douglas*, 41 La. An. 765; *Henderson v. Ellerman*, 47 La. An. 306. See *State Tax-Law Cases*, 54 Mich. 350. Publication of notice of sale held to satisfy the Iowa code: *Davis v. Magoun*, 109 Iowa 308.

³ Tax-collector need not post the notices himself, but may do so by deputy: *Lynch v. Donnell*, 104 Mo. 519. Posting in "the four most public places" in a city: *Ibid.* A statutory requirement that notice be set up "at the most public places in the county" means at more than one public place: *County Com'rs v. Clarke*, 36 Md. 206. Under a requirement that notice be posted "at least three weeks before the sale," it is enough for the certificate to show that the notices were posted three weeks before the sale, and it need not show that they remained posted for three weeks: *Lynch v. Donnell, supra.*

⁴ *Richardson v. Simpson*, 82 Md. 159; *Baumgardner v. Fowler*, 82 Md. 631; *Fleischauer v. Hoboken*, 40 N. J. L. 374; *Woodbridge v. Allen*, 44 N. J. L. 262; *Jones v. Landis T'p*, 50 N. J. L. 374; *Blackwell v. First Nat. Bank (N. M.)*, 63 Pac. Rep. 43. Notice sufficient if it conforms to state revenue law: *In re New Orleans*, 51 La. An. 792. Notice of tax-sale held sufficiently to specify the way in which the judgment was entered and in which the sale was to be made: *Towle v. St. Paul Perm. L.*

all the safeguards that have been deemed necessary to protect the interests of persons taxed, and nothing can be substituted for it or excuse the failure to give it.¹ The notice being a prerequisite to the officer's authority, the fact that in the particular case it can be shown that the party concerned was fully aware of the proceedings will be of no avail in supporting them. He is under no obligation to take notice of the pro-

Co. (Minn.), 86 N. W. Rep. 781. Notice held to be signed properly by the auditor: *Ibid.* As to the requisites of notice in general, see *Tolman v. Hobbs*, 68 Me. 316; *Taft v. Barrett*, 58 N. H. 447; *Hart v. Smith*, 44 Wis. 213. Mr. Blackwell says: "Where the form is prescribed by the statute, that form must be strictly and literally followed; the court will not admit the substitution of a different one:" *Blackw. on Tax Titles*, 223. True, if it is different in substance; but to say that the statutory form must be followed literally is stating a rule of compliance stricter than the authorities justify.

¹ *Washington v. Pratt*, 8 Wheat. 681; *Early v. Doe*, 16 How. 610; *Lyon v. Alley*, 130 U. S. 177; *Martin v. Barbour*, 34 Fed. Rep. 701; *Johnson v. Harper*, 107 Ala. 706; *McKinnon v. Mixon*, 128 Ala. 612; *Daniel v. Taylor*, 33 Fla. 636; *Langlois v. Stewart*, 156 Ill. 609; *Gage v. People*, 188 Ill. 192; *McWilliams v. Michel*, 43 La. An. 984; *Norres v. Hays*, 44 La. An. 907; *Concordia Parish v. Bertron*, 46 La. An. 356; *Montgomery v. Marydale, etc. Co.*, 46 La. An. 403; *Kohfman v. Glaudi*, 52 La. An. 700; *Wellman v. Willis*, 52 La. An. 1445; *Tensas Delta Land Co. v. Sholars*, 105 La. An. 357; *Foreman v. Hinchcliffe (La.)*, 30 South. Rep. 762; *Moulton v. Blaisdell*, 24 Me. 283; *Flint v. Sawyer*, 30 Me. 226; *Hill v. Mason*, 38 Me. 461; *Baumgardner v. Fowler*, 82 Md. 631; *Alexander v. Pitts*, 7 Cush. 503; *Prindle v. Campbell*, 9 Minn. 212; *McCord v. Sullivan (Minn.)*, 88 N. W. Rep.

989; *Blalock v. Gaddis*, 33 Miss. 452; *Reeds v. Morton*, 9 Mo. 868; *Large v. Fisher*, 49 Mo. 307; *Mowry v. Blandin*, 68 N. H. 3; *Bush v. Davison*, 16 Wend. 550; *Franklin v. Pearsall*, 53 N. Y. Super. Ct. 271; *Hill v. Nicholson*, 92 N. C. 624; *Roberts v. First Nat. Bank*, 8 N. D. 504; *Sweigle v. Gates (N. D.)*, 84 N. W. Rep. 481; *Dever v. Cornwell (N. D.)*, 86 N. W. Rep. 227; *Jenks v. Wright*, 61 Pa. St. 410; *Bean v. Brownwood*, 91 Tex. 684; *Olsen v. Bagley*, 10 Utah 492; *Ramsey v. Hommel*, 68 Wis. 12. Posting notice cannot be omitted when required by statute: *Baumgardner v. Fowler*, 82 Md. 631; *Olson v. Phillips*, 80 Minn. 339; *McCord v. Sullivan (Minn.)*, 88 N. W. Rep. 989; *Blackwell v. First Nat. Bank (N. M.)*, 63 Pac. Rep. 43; *Yenda v. Wheeler*, 9 Tex. 408; *Iverslie v. Spaulding*, 32 Wis. 394; *Morrow v. Lander*, 77 Wis. 77. See *Clark v. Rowan*, 53 Ala. 400; *Himmelman v. Cahn*, 49 Cal. 285; *Brooks v. Satterlee*, 49 Cal. 289; *Pitts v. Booth*, 15 Tex. 453. Notice of assessment is not notice of delinquency and of intent to sell the property for failure to pay the tax: *Genella v. Vincent*, 50 La. An. 956. A written notice will not answer where a printed notice is required by statute: *Lagrove v. Rains*, 48 Mo. 536. Want of notice is not cured by prescription: *Concordia Parish v. Bertron*, 46 La. An. 356; *Montgomery v. Marydale, etc. Co.*, 46 La. An. 403. Nor can it be validated by subsequent legislation: *McCord v. Sullivan (Minn.)*, 88 N. W. Rep. 989.

ceedings unless notified.¹ Mere informalities or unimportant variances in an attempt to comply with the law may not be fatal,² but variance in substance cannot be overlooked.³

It may be useful to notice some of the cases on the subject. Where the statute required the notice to contain a particular statement of the taxes on the lot, a notice not containing it was held void.⁴ So where the notice was for less than the statutory time, though but for a single day, the proceeding was held to be as defective as if no notice at all had been given.⁵

¹ One whose land was sold at a tax-sale without serving the statutory notice was held not estopped from asking that the sale be set aside by the fact that he gave notice at the sale to the purchaser that the latter would buy a lawsuit: *Bean v. Brownwood*, 91 Tex. 684.

² See *Stout v. Coates*, 35 Kan. 362; *Kane v. Brooklyn*, 114 N. Y. 586. Under the Mississippi statute it seems that defects in the notice will not invalidate the sale; *Virden v. Bowers*, 55 Miss. 1. In a statute providing that no irregularity or informality in the advertisement shall affect the legality of the sale or the title covered by the treasurer's deed, the word "advertisement" includes the posting as well as publication of the notice and is available to one holding merely a certificate of sale: *Davis v. Magoun*, 109 Iowa 308. The publication of notice of sale is not invalid because embraced in an advertisement with other judgment notices of tax-sale of different lots: *London, etc. Co. v. Gibson*, 77 Minn. 394. An erroneous statement of the time to redeem, not being required by the statute, will not invalidate the sale: *Ex parte Tax Sale*, 42 Md. 196. Failure to deliver notice of sale to the printer until after the day specified in the statute is not such a defect as a retrospective statute cannot cure: *Ensign v. Barse*, 107 N. Y. 329. The New Jersey statute validating tax-

sales in certain cases cannot remedy defects in notices of sale for taxes: *Jones v. Landis T'p*, 50 N. J. L. 374. In Louisiana want of thirty full days' advertisement of a tax-sale is an informality that is prescribed in five years: *Robinson v. Williams*, 45 La. An. 485.

³ *Morris v. St. Louis Nat. Bank*, 17 Colo. 231; *Hafey v. Bronson*, 33 Kan. 598; *Hoffman v. Groll*, 35 Kan. 652; *Richardson v. Simpson*, 82 Md. 159.

⁴ *Washington v. Pratt*, 8 Wheat. 681. See *Jenks v. Wright*, 61 Pa. St. 410. As to statement of amount of taxes, see, also, *ante*, p. 888.

⁵ *State v. Newark*, 36 N. J. L. 288. See *Townsend v. Martin*, 55 Ark. 192; *Martin v. McDiarmid*, 55 Ark. 213; *Caston v. Caston*, 60 Miss. 475. A similar ruling was made in *Pope v. Headon*, 5 Ala. 433. And see *Elliott v. Eddins*, 24 Ala. 508; *Flint v. Sawyer*, 30 Me. 226; *Hobbs v. Clements*, 32 Me. 67. A week is a fixed period of seven days, and a statute requiring an advertisement of a tax-sale to be made once a week for thirty days does not require it to be made on the same day of each week: *In re New Orleans*, 52 La. An. 1073; *Hansen v. Mauberret*, 52 La. An. 1565. To the same effect, *Wood v. Knapp*, 100 N. Y. 109. As to what is a publication three times for three successive weeks, see *Andrews v. People*, 83 Ill. 529, 84 Ill. 28; *Rickets v. Hyde Park*, 85 Ill. 110. Publication once in each

So where the notice was required to be published for a certain time in the office of the state printer, and the publication was

week for four successive weeks: Ramsey v. Hammel, 68 Wis. 12; Morris v. Carmichael, 68 Wis. 133. see Bentley v. Shingler, 111 Ga. 780; Textor v. Shipley, 86 Md. 424; Munroe v. Winegar (Mich.), 87 N. W. Rep. 396. Twelve weeks' notice of sale requires eighty-four full days: Early v. Doe, 16 How. 610. As to what is a publication for three weeks, see Loughridge v. Huntington, 56 Ind. 253. Advertisement "weekly for two weeks:" Ebaugh v. Mullinax, 40 S. C. 244. Under a statute requiring notice to be published "weekly for two weeks" between certain dates, two weeks must elapse between the first publication and the later of the specified dates: Martin v. Barbour, 34 Fed. Rep. 701. Where a statute requires four successive weeks' publication, it means twenty-eight days excluding the first day and including the day of sale: O'Hara v. Parker, 27 Or. 156. Under a requirement that notice be published "once in each of two successive weeks, the last publication to be not less than ten days before the day of sale, notice on the 2d and 9th of the month of a sale on the 26th suffices: Kipp v. Collins, 33 Minn. 394. "Once a week for three consecutive weeks preceding the sale" means that the publication must continue for three full weeks of seven days each, a total period of twenty-one days preceding the sale: Dever v. Cornwell (N. D.), 86 N. W. Rep. 227. Publication for "at least three weeks" with notice that lands will be sold on the "Monday next succeeding" said three weeks: Boehm v. Porter, 54 Ark. 665. A statute requiring publication for three successive weeks, at least six weeks before sale, requires the last publication to be at least six weeks

before the sale: Mowry v. Blandin, 64 N. H. 3. Under a requirement that the notice shall state that the sale shall take place "not less than thirty days after the first publication thereof," a notice published March 15th authorizes a sale April 14th: Kane v. Brooklyn, 114 N. Y. 586. A notice published February 11th for a sale March 3d is a twenty-day notice: Carpenter v. Shinnars, 108 Cal. 359. Where the law requires advertisement for thirty days, an advertisement once a week for four weeks is bad: Rish v. Ivey, 76 Ga. 738. Yet one insertion of the advertisement in each calendar week during the period of thirty days immediately preceding the day of sale will suffice if the first insertion appeared at least thirty days before the sale. Where notice is required to be for ten days, Sundays excepted, and it is omitted two days, not Sundays, it is void: Haskell v. Bartlett, 34 Cal. 281. So if it be omitted one week-day and published Sunday: San Francisco v. McCain, 50 Cal. 210; People v. McCain, 51 Cal. 360. If the last of the number of days prescribed should be Sunday, the notice should be published Monday: Alameda, etc. Co. v. Huff, 57 Cal. 331. See Falch v. People, 8 Ill. App. 351. See, further, as to time of publication: Moore v. Brown, 4 McLean 211, 11 How. 414; Clarke v. Rowan, 53 Ala. 400; Pennell v. Monroe, 30 Ark. 661; Dubuque v. Wooton, 28 Iowa 571; Renshaw v. Imboden, 31 La. An. 661; United Copper Mining, etc. Co. v. Franks, 85 Me. 321; Steuart v. Meyer, 54 Md. 454; Cass v. Bellows, 31 N. H. 501; Westbrook v. Willey, 47 N. Y. 457; Kellogg v. McLaughlin, 8 Ohio 114; Eaton v. Lyman, 33 Wis. 34; Hilgers v. Quinney, 51 Wis. 62.

duly begun, but before completion the paper ceased to be that of the state printer, it was held insufficient.¹ So a notice is defective if the collector in appending his name fails to add his name of office, so that it does not appear to be official;² or if given before the person has in fact been sworn into office;³ or if delayed after the time prescribed by law for its publication.⁴ And the notice is bad if it differs from the assessment in giving the name of the person to whom the land is taxed;⁵ or if it fails to give the name of the person taxed when the statute requires it;⁶ or if the description of the land is insuffi-

¹ *Bussey v. Leavitt*, 12 Me. 378. Compare *Pope v. Headon*, 5 Ala. 433; *Lyon v. Hunt*, 11 Ala. 295; *Cambridge v. Chandler*, 6 N. H. 271; *Sharp v. Johnson*, 4 Hill 92. A change in the name of the paper in which the notice is required to be published will not affect the notice: *Reimer v. Newell*, 47 Minn. 237; *Isaacs v. Shattuck*, 12 Vt. 668. A statute requiring the "time, place, and manner" of a sale for municipal taxes to be the same as that provided by law for state and county taxes does not require the advertisement to appear in the paper in which the sheriff's sales are advertised: *Bacon v. Savannah*, 86 Ga. 301; *Scheurman v. Columbus*, 106 Ga. 34. Place of publication of newspaper, how determined: *Tonawanda v. Price* (N. Y.), 64 N. E. Rep. 191. Where a common council is required to give a notice in a paper to be designated, the designation must be made by the council: *Appeal of Powers*, 29 Mich. 504. And as to designation of the paper, see *ante*, pp. 887, 888. The publication of notice, not in the regular issue of a paper, but in extra sheets not sent to all the subscribers, is insufficient: *Davis v. Simms*, 4 Bibb 465; *Tully v. Bauer*, 52 Cal. 487; *Zahradnicek v. Selby*, 15 Neb. 579. Publication in a supplement, instead of in the paper proper, held valid: *Watts v. Bublitz*, 99 Mich. 586; *Mann v. Carson*, 120

Mich. 631; *Wilkin v. Keith*, 121 Mich. 66. As to paper printed in foreign language, see *ante*, p. 887.

² *Spear v. Ditty*, 9 Vt. 282. See *Broughton v. Journeay*, 51 Pa. St. 31.

³ *Langdon v. Poor*, 20 Vt. 13. See *Hannel v. Smith*, 15 Ohio 134.

⁴ *Hill v. Mason*, 38 Me. 461. Compare *Brackett v. Vining*, 49 Me. 356; *Pierce v. Benjamin*, 14 Pick. 356; *Noyes v. Haverhill*, 11 Cush. 338; *Kelly v. Craig*, 5 Ired. 129; *Magee v. Commonwealth*, 46 Pa. St. 358.

⁵ *Marx v. Hanthorn*, 148 U. S. 172, 30 Fed. Rep. 579; *Harness v. Cravens*, 126 Mo. 233; *Bettison v. Budd*, 21 Ark. 578, citing *Wait v. Gilmore*, 2 Yeates 330; *Shimmin v. Inman*, 26 Me. 332. And see *Del Castillo v. McConnico*, 168 U. S. 674; *Alvord v. Collin*, 20 Pick. 418; *Workingmen's Bank v. Lannes*, 30 La. An. 871. The omission, in a list of sales for taxes, to state the owner's estate, will not annul the tax-deed in West Virginia: *State v. Sponaugle*, 45 W. Va. 415. Advertisement held sufficient when containing the name of the person to whom the land was taxed instead of the actual owner at the time of sale: *Langley v. Batchelder*, 69 N. H. 566.

⁶ *Sargent v. Bean*, 7 Gray 125; *Miller v. Clarke*, 61 Ala. 258; *Workingmen's Bank v. Lannes*, 30 La. An. 871. The omission from the notice of the name of the person to whom the land is assessed does not, in Kansas, vitiate

cient;¹ or if the place for holding the sale is so vaguely stated as not to give the requisite information;² or if the year for which the sale is to take place is incorrectly given.³ The omission to state that the land will be sold at public auction has been held to render the deed voidable.⁴

As regards all such cases, the law is well summed up in a case in which the statute required the notice to state the "amount of taxes assessed," and the notice given was incorrect in this particular. "The advertisement did not state the amount of the tax assessed on the land, but stated a wholly different amount, and for all legal purposes might as well have contained no statement whatever of the amount of the tax. To comply with the statute the exact amount must be given. A deviation,

the title conveyed by a tax-deed: *Shoup v. Central Branch N. P. R. Co.*, 24 Kan. 548; *Ireland v. George*, 41 Kan. 751. A statute requiring that all houses and lots or other lands lying contiguous to each other and belonging to the same owner shall be advertised in one parcel means, by "owner," the person in whose name, as owner or occupant, the lots are assessed: *People v. Cady*, 105 N. Y. 299. Failure of the collector's notice to give the name of the "occupants" invalidates the sale: *Amoskeag Sav. Bank v. Alger*, 66 N. H. 414.

¹ *Hintrager v. Nightingale*, 36 Fed. Rep. 847; *Ryan v. Staples*, 76 Fed. Rep. 721; *Cooper v. Lee's Heirs*, 59 Ark. 460; *Richardson v. Simpson*, 82 Md. 159. Such a defect could not be aided by any information imparted by the auctioneer to the bidders at the sale: *Ronkendorf v. Taylor*, 4 Pet. 349. As to the requisites of description, see *Gachet v. McCall*, 50 Ala. 307; *Milner v. Clark*, 51 Ala. 255; *Garrick v. Chamberlain*, 97 Ill. 620; *Pointdexter v. Doolittle*, 54 Iowa 52; *Vaughan v. Stone*, 55 Iowa 213; *Thibodaux v. Kellar*, 29 La. An. 508; *Nelson v. Abernathy*, 74 Miss. 164; *Barton v. Gilchrist*, 19 W. Va. 223. A description is said to be bad "if

from it a purchaser could not obtain sufficient knowledge of the identity of the land to form an intelligent judgment of its value:" *Nason v. Ricker*, 63 Me. 381. In some states the description in the notice is required to follow that in the assessment: see *Rougelot v. Quick*, 34 La. An. 123. As to description in Iowa, see *Iowa, etc. Co. v. Sac County*, 39 Iowa 124; *Chicago, etc. R. Co. v. Carroll County*, 41 Iowa 153; *Shawler v. Johnson*, 52 Iowa 472.

² *Workingmen's Bank v. Lannes*, 30 La. An. 871; *Ex parte Tax Sale*, 42 Md. 196; *Henderson v. White*, 69 Tex. 103. The advertisement need not state that the place of sale is a public place: *Langley v. Batchelder*, 69 N. H. 566. Announcement by county treasurer of sale "at my office," held not misleading: *Ireland v. George*, 41 Kan. 751.

³ *Knowlton v. Moore*, 136 Mass. 32. It seems, however, that if the notice is for a sale for the taxes of several years, when only one year's tax is required, it may be sustained as a good notice for the one year: *Thweatt v. Black*, 30 Ark. 732.

⁴ *Hafey v. Bronson*, 33 Kan. 598; *Hoffman v. Groll*, 35 Kan. 652.

however small, must be fatal, because a rule of law cannot be made to fluctuate according to the degree or extent of its violation."¹

The most important of the usual requisites of notice of sale are that it shall give a proper description of the land to be sold,² and a statement of the time and place³ when and where the sale will be made. The requisites for a description in the assessment roll have been given heretofore.⁴ In the notice, as in the assessment, there is precisely the same necessity that the description shall be sufficiently definite to identify the land, in order that the owner may be apprised of the peril to which his interests are exposed.⁵ What has been said regard-

¹ *Bigelow, J.*, in *Alexander v. Pitts*, 7 Cush. 503. The amount of the tax was \$3.30, that stated in the notice was \$4.12. Compare *Clarke v. Strickland*, 2 Curt. C. C. 439; *Collins v. Welch*, 38 Minn. 62; *Bonham v. Weymouth*, 39 Minn. 92; *Derry Nat. Bank v. Lepper*, 68 N. H. 183; *Mather v. Darst*, 13 S. D. 75; *Eastman v. Gurrey*, 15 Utah 410. That an immaterial variation in the notice from that required by the statute may be overlooked, see *Ogden v. Harrington*, 6 McLean 418; *Hodgson v. Burleigh*, 4 Fed. Rep. 111; *Scott v. Watkins*, 22 Ark. 556. A statement in the advertisement of sale, of a tax on "\$17.46 for the year 1895 and 1896," does not meet the requirement of statements of two taxes—one of \$8.46 for the year 1895, and one of \$9.00 for 1896; *Lancy v. Snow (Mass.)*, 62 N. E. Rep. 736. The amount due on the taxes up to the date of sale need not be included in the notice: *Stevens v. Paulsen (Neb.)*, 90 N. W. Rep. 211.

² *Lee v. Crawford (N. D.)*, 88 N. W. Rep. 97. A description of land in a notice of sale for delinquent taxes suffices where it enables a person of ordinary intelligence to identify the land: *Doherty v. Real Estate, etc. Co. (Minn.)*, 89 N. W. Rep. 853.

³ *Boynton v. People*, 166 Ill. 64, which holds that where a judgment

of sale for delinquent assessments is appealed from and affirmed, and the time for which the original notice of sale was given has passed without any sale, sale cannot be ordered without new notice. A notice that "so much of the following lands as may be necessary will on the third day of September and next succeeding days be sold" is not misleading as to time of sale: *Ireland v. George*, 41 Kan. 751.

⁴ See *ante*, pp. 740-750. Where land is not so described in the assessment as to be identified, the defect cannot be cured by an accurate description in the report of sale: *Morristown v. King*, 11 Lea 669.

⁵ See *Hodgdon v. Burleigh*, 4 Fed. Rep. 111; *Hintrager v. Nightingale*, 36 Fed. Rep. 847; *Oliver v. Robinson*, 58 Ala. 46; *Crane v. Randolph*, 30 Ark. 579; *Doyle v. Martin*, 55 Ark. 57; *Cooper v. Lee's Heirs*, 59 Ark. 460; *Chestnut v. Harris*, 64 Ark. 580; *Boles v. McNeil*, 66 Ark. 422; *Williams v. Harris*, 4 Sneed 332; *Boyd v. Wilson*, 86 Ga. 379; *Pickering v. Lomax*, 120 Ill. 289; *Griffin v. Crippen*, 60 Me. 270; *Cooper v. Holmes*, 71 Md. 20; *Richardson v. Simpson*, 82 Md. 155; *Farnum v. Buffum*, 4 Cush. 260; *Bidwell v. Webb*, 10 Minn. 59; *Bidwell v. Coleman*, 11 Minn. 78; *Olivier v. Gurney*, 43 Minn. 69; *McQuade v.*

ing the description under the head of assessment is consequently applicable here. The cases referred to in the margin discuss other defects, or alleged defects, in notices of sale, and may be useful for reference.¹ Consent of the owner of land to a defective publication of notice, it has been held, would not bind him, as he cannot, in that manner, confer an authority upon an officer of the law, nor can he pass a title to his freehold by mere waiver.² Proof of giving the notice should be duly made of record,³ and it ought to show what the facts are,

Jaffray, 47 Minn. 326; Nelson v. Abernathy, 74 Miss. 164; Comfort v. Ballingal, 134 Mo. 281; Eastman v. Little, 5 N. H. 290; Drew v. Morrill, 62 N. H. 23; Langley v. Batchelder, 69 N. H. 566; Warshung v. Hunt, 47 N. J. L. 256; Hunt v. State, 48 N. J. L. 613; People v. McGuire, 126 N. Y. 419; White v. Wheeler, 51 Hun 573, 4 N. Y. Supp. 405; Smith v. Wheeler, 56 N. Y. 391, 4 N. Y. Supp. 632; Edwards v. Lyman, 122 N. C. 741; Sweigle v. Gates, 9 N. D. 538; Glass v. Gilbert, 58 Pa. St. 266, 290; Everhart v. Nesbitt, 182 Pa. St. 353; Eastman v. Gurrey, 15 Utah 410; Midlothian L. M. Co. v. Dahlby, 108 Wis. 185. A description, "80x143 feet in Wilson's Addition in S. 29, T. 23, R. 4," though so uncertain as to render a sale ineffective, is sufficiently certain to carry a lien: *Milikan v. Lafayette*, 118 Ind. 323. The Michigan statute requiring the auditor-general to publish a notice of the sale of lands bid in by the state was not enacted to give the owner farther notice before the expiration of the period of redemption, and such notice need not contain a description of the lands to be sold: *Garner v. Wallace*, 118 Mich. 387.

¹ *Ireland v. George*, 41 Kan. 751; *Sutton v. Calhoun*, 14 La. An. 209; *Porter v. Whitney*, 1 Greenl. 306; *Shimmin v. Inman*, 26 Me. 228; *Hobbs v. Clements*, 32 Me. 67; *Greene v. Lunt*, 58 Me. 518; *Styles v. Weir*, 26 Miss. 187; *Smith v. Messer*, 17 N. H.

420; *Pierce v. Richardson*, 37 N. H. 306, 314; *Hughey v. Harrell*, 2 Ohio 331; *Langdon v. Poor*, 20 Vt. 13.

² *Scales v. Alvis*, 12 Ala. 617. See *Charlton v. Kelly*, 24 Colo. 273.

³ *Martin v. Barbour*, 140 U. S. 634, 34 Fed. Rep. 701; *Rustin v. Merchants', etc. Co.*, 23 Colo. 351; *Comfort v. Ballingal*, 134 Mo. 281. See *Brooks v. Union T'p (N. J.)*, 52 Atl. Rep. 238. Where the return does not show that one of the five notices of sale was posted at or near the place to be sold, as required by the statute, parol proof to supply this omission is not admissible: *Jones v. Landis T'p*, 50 N. J. L. 374. Where the affidavit of the city treasurer does not show a proper posting of notices, the fact that they were duly posted cannot be shown by parol in an action involving the validity of the tax-title, as this would defeat the object of the statute in requiring such affidavits to be filed and preserved: *Iverslie v. Spaulding*, 32 Wis. 394. Where the affidavit of posting notice of sale stated that it was posted "in four public places in said county," but did not state, as the law required, that one of said copies was posted in some conspicuous place in the treasurer's office, it must be assumed that this was the only proof of posting on file in the city treasurer's office: *Jarvis v. Silliman*, 21 Wis. 600. A statute providing that the affidavit of a disinterested person as to giving of a certain notice of a tax-sale, made and filed in a certain

so that any one inspecting the record may know that the statute has been complied with. An affidavit, or a return, which undertakes to state merely the legal conclusion that "due notice" was given, or "legal notice," or "notice as required by the statute," or to make any other allegation of a similar nature, should not be received as sufficient evidence that the law has been complied with. It is, in fact, evidence only of the officer's opinion that he has performed his duty.¹ While a statutory form of affidavit for proving publication of the notice need not be followed literally, yet if the substantial requisites are disregarded the proof of notice must be held sufficient.²

manner, shall be competent evidence of such notice, does not exclude proof of the notice by other evidence: *Southworth v. Edmonds*, 152 Mass. 203. Under a statute requiring affidavits of posting notices, etc., to be filed within a certain time, it is enough if a certificate of posting be sworn to within that time: *Drew v. Morrill*, 62 N. H. 23. It has, however, been held that if the proof of publication of notice of a tax-sale is not transmitted to the county treasurer within the time required by the statute, the charge therefor cannot be included in the amount for which the property is sold, and that if it is so included the sale is void: *Fox v. Cross*, 39 Kan. 350; *Blanchard v. Hatcher*, 40 Kan. 350; *Jackson v. Chellis*, 41 Kan. 247; *Douglas v. Walker*, 57 Kan. 328.

¹ *Games v. Stiles*, 14 Pet. 322; *Morris v. St. Louis Nat. Bank*, 17 Colo. 231; *King v. Sears*, 91 Ga. 577; *Lambert v. Craig*, 45 La. An. 1109; *Lovejoy v. Lunt*, 48 Me. 377; *Farnum v. Buffum*, 4 Cush. 260; *People v. Highway Com'rs*, 14 Mich. 528; *Nelson v. Pierce*, 6 N. H. 194; *Wells v. Burbank*, 17 N. H. 393; *Gilbert v. Turnpike Co.*, 3 Johns. Cas. 107; *Cheatnam v. Howell*, 6 Yerg. 311; *Gwin v. Vanzant*, 7 Yerg. 143; *Briggs v. Whipple*, 7 Vt. 18; *Jesse v. Preston*, 5 Grat. 120; *Wisconsin Central R.*

Co. v. Wisconsin River L. Co., 71 Wis. 94. Where the statute required that the notices should be published by posting up a copy thereof "in each county commissioner's district," an affidavit by the auditor that he handed two copies to the sheriff, requesting him to put one up in each of the districts, and that they were "put up publicly," is fatally defective: *Pierce v. Sweetser*, 2 Ind. 649. A certificate that notice was published for thirty days, beginning Feb. 21st, 1869, is not sufficient proof that the notice was published "once a week for four weeks," as required by the code; the proof in this respect must be affirmative and certain, and not left to conjecture and inference: *County Com'rs v. Clarke*, 36 Md. 206.

² *Morris v. St. Louis Nat. Bank*, 17 Colo. 231; *Rustin v. Merchants*, etc. Co., 23 Colo. 351. The latter case holds fatally defective an affidavit which failed to contain the statement, required by statute, that the copies of each number of the paper in which the notice was published were delivered or transmitted to each of the subscribers of the paper according to the accustomed business of the office. Where the statute requires the tax-collector to lodge with the town-clerk a copy of his notice of an intended tax-sale, with

Under some statutes publication is presumed if there is nothing in the tax-deed to show that notice was not given,¹ or if the deed recites full compliance with the statute;² but if the law requires proof by affidavit such proof must be made,³ and it cannot be dispensed with by admissions.⁴

Time and place of sale. The sale must be made at the very time and place provided by law for that purpose.⁵ In this regard the utmost strictness is required, since otherwise

his certificate "that he has given notice of the intended sale as required by law," it is insufficient for him to attach to the copy of the notice a certificate merely that such copy is a "true copy of the notice of the aforesaid as required by law": *Bowler v. Brown*, 84 Me. 376.

¹ *Hayes v. Ducasse*, 119 Cal. 682.

² *Deringer v. Coxe* (Pa.), 10 Atl. Rep. 412. Presumption that sale was advertised as required by the statute held not overcome by the fact that several issues of the paper in which the notice was published could not be produced: *Bedgood v. Mc-Lane*, 94 Ga. 283.

³ *Charlton v. Kelly*, 24 Colo. 273. Statute making affidavit of disinterested person competent proof of notice if made and filed in a certain manner, held not to exclude proof by other evidence: *Southworth v. Edmunds*, 152 Mass. 203. County treasurer's testimony that proofs required by law were made and filed, held insufficient to prove that the statutory requirements had ever been carried out: *Hiles v. Cate*, 75 Wis. 91. Where some evidence is offered tending to show that a delinquent tax-notice was duly posted in four public places as required by law, such evidence, if approved by the trial court, is conclusive: *Ireland v. George*, 41 Kan. 751.

⁴ *Charlton v. Kelly*, 24 Colo. 273.

⁵ *Richards v. Cole*, 31 Kan. 205; *Burdick v. Bingham*, 38 Minn. 482; *Yazoo & M. C. R. Co. v. West*, 78

Miss. 789; *Poillon v. Rutherford Borough*, 58 N. J. L. 113. Sale on a day not authorized by law is void: *Taylor v. Van Meter*, 53 Ark. 204; *Penrose v. Doherty*, 55 Ark. 549; *Byrd v. McDonald* (Miss.), 28 South. Rep. 847; *Salmer v. Lathrop*, 10 S. D. 216. Under the California statute a sale noticed for a legal holiday but held two days later is not invalid: *Baxter v. Dickinson* (Cal.), 68 Pac. Rep. 601. The sheriff has no general power to sell for taxes, but only at the time and place fixed by law: *Hogins v. Brashears*, 13 Ark. 242; *Herrick v. Hutt*, 15 Ark. 331; *Bonnell v. Roane*, 20 Ark. 114. "The proper time for the sale is the time stated in the publication of the delinquent list made in conformity with the statute;" and, if the publication is illegal, the deed is void: *Tully v. Bauer*, 52 Cal. 487. As to the time for sale in Massachusetts, see *Kelso v. Boston*, 120 Mass. 297. And in Utah, see *Little v. Gibbs*, 8 Utah 261. Where the statutory time for selling land differs according to the character of the property as resident or non-resident, the confirmation of an assessment by the court fixes such character, and if a resident becomes non-resident afterwards the collector will proceed as against a non-resident: *Gossett v. Kent*, 19 Ark. 602. Where a collector's sale was advertised at a particular time and place, and the collector's return states it to have been held in the town and on the day

the whole purpose of the notice, both as regards information to the public and protection to the owner of the land, will be defeated. A sale inside a building, when the law requires it to be at the outer door, has been held to be void.¹ So a sale either before or after the time which has been named for the purpose is wholly without warrant of law, and cannot be sustained.² If, however, an adjournment from day to day is au-

designated, it will be presumed, in the absence of proof to the contrary, that it was held at the precise time and place specified: *Spear v. Ditty*, 8 Vt. 419. In Connecticut, it seems, a tax-collector need not specify in his return the day on which the sale was made: *Picket v. Allen*, 10 Conn. 146. A sale is void if made after the warrant's life has expired: *Kelly v. Herrall*, 23 Fed. Rep. 364. So it is void if the advertisement of sale is begun sooner than the law authorizes: *Person v. O'Neal*, 32 La. An. 228. In Iowa, by statute, a deed is made conclusive evidence of compliance with the statute in respect to time of sale: *Shawler v. Johnson*, 52 Iowa 472. And if the sale is not made when it should be it may be made afterwards: *Litchfield v. Hamilton County*, 40 Iowa 66. But if a statute extending for thirty days the time for collection of taxes makes no provision for selling lands at the end of that time, the lands cannot be sold until the regular time in the next year: *McConnell v. Day*, 61 Ark. 464.

¹*Rubey v. Huntsman*, 32 Mo. 501; *Vasser v. George*, 47 Miss. 713, 721. See *Smith v. Cox*, 115 Ala. 503; *Crisman v. Johnson*, 23 Colo. 264; *Scarry v. Lewis*, 133 Ind. 96; *State v. Rollins*, 29 Mo. 267; *McNair v. Jensen*, 33 Mo. 212; *Sommers v. Ward*, 41 W. Va. 76; *Lander v. Ward*, 79 Wis. 372. A sale of property for municipal taxes should not be made where the mayor and aldermen have not directed the

tax-collector where to sell: *Nixon v. Biloxi*, 76 Miss. 810. Court-house burnt, front door of building designated by supervisors as court-house held proper place for sale: *Thayer v. Hartman* (Miss.), 29 South. Rep. 396. Presumption as to identity of places—offices of county officers: *Hoge v. Magnes*, 85 Fed. Rep. 355, 29 C. C. A. 564. As to what is to be deemed "a place" for the purpose of a sale in New Hampshire, see *Cahoon v. Coe*, 57 N. H. 556; *Hoitt v. Burnham*, 61 N. H. 620. It was held in *Howland v. Pettey*, 15 R. I. 603, that a sale of lands under execution for taxes, made at the sheriff's office about twenty miles distant from the premises sold, would not be set aside where it appeared that there was good faith on the officer's part, and that no objection was made to the place of sale during the three months of advertisement, and where for more than five years no steps were taken to set the sale aside.

²*Vernon v. Nelson*, 33 Ark. 748; *Allen v. Ozark Land Co.*, 55 Ark. 549; *Hope v. Sawyer*, 14 Ill. 254; *Orr v. Travacier*, 21 Iowa 68; *Plympton v. Sapp*, 55 Iowa 195; *Nesbitt v. Liggett*, 10 Bush 137; *Davis v. Schmidt*, 68 Miss. 736; *Tay-payers' Protect. Assoc. v. Kirkpatrick*, 41 N. J. Eq. 370; *Avery v. Rose*, 4 Dev. 549; *Doe v. Allen*, 67 N. C. 346; *Wilkins's Heirs v. Huse*, 10 Ohio 139; *Dougherty v. Crawford*, 14 S. C. 628; *Whittaker v. Deadwood*, 12 S. D. 608. Where the statute requires the sale

thorized, in order to complete a sale after it has been begun, perhaps a reasonable presumption that the sale was begun in season, and adjourned as thus provided, should uphold a sale appearing to have been made afterwards, in the absence of any showing to the contrary.¹ Where it is provided by statute that if lands duly advertised are not sold because of restraining orders, they may, on dissolution of the orders, be sold on ten days' notice, a deed, otherwise regular, showing a sale made on a day more than ten days after the first advertised day, is *prima facie* given on a sale duly made.² A provision that the treasurer "may adjourn from day to day until all the lands shall have been offered," has been held to be mandatory.³

Who may make the sale. Without express legislation the officers of a newly-organized county have not power to sell

to be made within two years from the date of the warrant, a sale at a later day is void: *Usher v. Taft*, 33 Me. 199. A sale made before the day fixed by law is a nullity: *Gomer v. Chaffee*, 6 Colo. 314; *McGehee v. Martin*, 53 Miss. 519; *Harkreader v. Clayton*, 56 Miss. 383; *Caston v. Caston*, 60 Miss. 475; *Conrad v. Darden*, 4 Yerg. 407. Where the regular time for sale is the first Monday of March, but a sale at another time may be ordered by the probate court, a deed reciting a sale at another time, but reciting no order, is void on its face: *McDermott v. Scully*, 27 Ark. 226; *Spain v. Johnson*, 31 Ark. 314. Sale not made at time appointed, designation of later time: *Brougher v. Conley*, 62 Miss. 358; *Clarke v. Frank*, 64 Miss. 827. Sale not begun on day fixed by law is a nullity: *Allen v. Ozark Land Co.*, 55 Ark. 549; *Park v. Tinkham*, 9 Kan. 615; *Entrekin v. Chambers*, 11 Kan. 368; *Prindle v. Campbell*, 9 Minn. 212; *Sheehy v. Hinds*, 27 Minn. 259. Requirement that sale be kept open until a certain hour: *State v. Farney*, 36 Neb. 537. As proceedings for collection are essentially *in invitum*,

and do not presuppose the existence of any contract relation, a statute which has the effect of hastening the time of sale as to lands previously assessed is valid: *Muirhead v. Sands*, 111 Mich. 487.

¹ See *Bestor v. Powell*, 2 Gilm. 119; *Hurley v. Street*, 29 Iowa 429; *Love v. Welch*, 33 Iowa 192; *Easton v. Savery*, 44 Iowa 654; *Lacey v. Davis*, 4 Mich. 140; *Burns v. Lyon*, 4 Watts 363. As to the authority to adjourn sale, see *Montford v. Allen*, 111 Ga. 18; *Lynch v. Donnell*, 104 Mo. 519; *Shell v. Duncan*, 31 S. C. 547; *Wells v. Austin*, 59 Vt. 157; *Collins v. Sherwood* (W. Va.), 40 S. E. Rep. 603. In Iowa a tax-deed showing that the land was sold at an adjourned sale, without reciting the causes justifying it, is at least *prima facie* evidence that the sale was properly held, and that a proper cause for adjournment existed: *Lorain v. Smith*, 37 Iowa 67. Deed on adjourned sale void for want of proper recital as to adjournment: *Gregg v. Jesberg*, 113 Mo. 34.

² *Patterson v. Carruth*, 13 Kan. 494; *Morrill v. Douglass*, 17 Kan. 291; *Jordan v. Kyle*, 27 Kan. 190.

³ *State v. Farney*, 36 Neb. 537.

land for taxes which were levied before the territory constituting such county was detached from an older county; such taxes are payable to the latter.¹ In some states an officer whose term has expired may sell land for non-payment of taxes charged upon the delinquent lists received by him.² It is held that a deputy collector's act in making sale is the collector's act;³ but a sale in the absence of both treasurer and his deputy by a mere clerk who represented the purchaser, and who bid off the lands for him, was declared to be void.⁴ In Indiana, although the statute requires the treasurer to sell land for delinquent taxes, a sale by the auditor, if regular in other respects, is not void.⁵ And a sale by a *de facto* officer is valid.⁶

Conduct of the sale. The officer must conduct the sale in the manner prescribed by law,⁷ and for the best interest of all concerned.⁸

Competition at the sale. The sale must be a public sale with opportunity for open competition.⁹ This is an universal re-

¹ Hilliard v. Griffin, 71 Iowa 651; Pitts v. Lewis, 81 Iowa 51; Ellsworth v. Nelson, 81 Iowa 57.

² Cummings v. Cummings, 91 Fed. Rep. 602. He is also the proper person to execute deeds on sales so made by him; and a deed executed by his successor is void, unless in case of his death: Ibid. In Maryland, a collector authorized to collect the uncollected taxes turned over from his predecessor, cannot, in the absence of express statutory provision, sell under a levy made for the collection thereof by his predecessor: Duvall v. Perkins, 77 Md. 582.

³ Villey v. Jarreau, 33 La. An. 291.

⁴ Hall v. Collins, 117 Mich. 617.

⁵ Gable v. Seiben, 137 Ind. 555.

⁶ Baxter v. Dickinson (Cal.), 68 Pac. Rep. 601.

⁷ Garlington v. Copeland, 32 S. C. 57. Where a statute regulates the sale for non-payment of taxes of lands leased from the state, the provisions cannot be changed by city ordinance: Street v. Columbus, 75 Miss. 822.

⁸ Wells v. Austin, 59 Vt. 157. To entitle one to have a tax-sale set aside on the ground that the taxpayer was absent and that no *curator ad hoc* was present to represent him, the evidence must be clear that at the sale the property was vacant, or that the owner was unknown or absent, or left no known owner in the state: Pickett v. Southern Athletic Club, 47 La. An. 1605. Where the county treasurer had in good faith struck off the land to one not present and bidding, it was held that the sale was not void, but that the irregularity was cured by the six-year statute of limitations: Dodge v. Emmons, 34 Kan. 732. So a purchase of land by one not present at the sale, either in person or by agent, but pursuant to a previous secret arrangement with the treasurer, does not render the sale void; and the purchaser cannot be held to account for the proceeds of a subsequent sale of the land: Lamb v. Davis, 74 Iowa 719.

⁹ Stevens v. Williams, 70 Ind. 536;

quirement; and it may seriously be questioned whether the legislature possesses the power to provide for extinguishing the owner's title by a secret or private sale. The sale itself is a proceeding to perfect a statutory forfeiture. The legislature probably has authority to declare a forfeiture of property taxed for delinquency in making payment; but in such an act the sovereign power of the state is pushed to the very limit, and it is believed that a statute which comes short of such a declaration, and leaves the title still in the owner, could not provide for divesting him of it by means of administrative proceedings secretly taken, and of which neither actual nor constructive notice was to be given to him. A public sale is the usual and proper course; and this, in order to constitute any protection to the owner, must be so made as to invite competition. And, as having an important influence on this subject, the courts have been compelled to take notice of fraudulent practices, which are almost as common as tax-sales themselves. "I am aware," says one learned judge, "that there is much management and fraudulent perversion of the law about purchasing at treasurer's sales. It is our duty to discountenance it."¹ "Over a sale of this description," says another, "the owner has no control; he cannot refuse a bid, or adjourn the sale, or fix a sum below which the property shall not be struck down. The sale is managed by the agent of the state. The owner is not consulted. The highest bidder becomes the purchaser, al-

Miller v. Corbin, 46 Iowa 150; Jenks v. Wright, 61 Pa. St. 410. In Kansas it was held that a payment by one who buys at private sale does not divest the lien of the tax: Harris v. Draught, 24 Kan. 524. Where an officer, after announcing that the sale would be continued from day to day, failed to resume the public sale, and only sold as persons from time to time came to the office, and this was continued during eight months, the sales were held void as essentially private, and the deeds were not considered conclusive evidence that the sales were public and legal: Butler v. Delano, 42 Iowa 350; Chandler v. Keeler, 46 Iowa 596; Bullis v. Marsh,

56 Iowa 747; Truesdell v. Green, 57 Iowa 215. The last case holds that if in fact no sale at all is made, but after adjournment lands are simply marked sold to purchasers, the proceeding is void, and a subsequent purchaser without knowledge of the invalidity would nevertheless get no title. If one hands to the officer making the sale a slip indicating the description he wishes, and it is privately entered as sold to him, this is no sale: Young v. Rheinecker, 25 Kan. 366. See Besore v. Dosh, 43 Iowa 211.

¹ *Burnside, J.*, in *Donnel v. Bellas*, 11 Pa. St. 341, 351.

though the sum bid is less than a hundredth part of the value of the property.”¹ Acres for cents is the rule; the purchasers who congregate at the sale are usually speculators anticipating enormous profits on their investments; and competition in purchases is usually the last thing they desire. The persons in default will, in many cases, be poor and friendless; at any rate they will not be present; and the officer will commonly be found sufficiently disposed to be complaisant to the interests of those who are at hand. It is not surprising, therefore, if in some instances it is discovered that he has accommodated them to an extent that practically excludes all competition.² It is still more common, perhaps, that purchasers in a friendly way arrange among themselves that no competition shall take place, and that the harvest shall be equitably apportioned between them. All such arrangements are a fraud upon the law and upon those whose protection is had in view when a public sale is provided for. “It is essential to the validity of tax-sales, not merely that they should be conducted in conformity with the requirements of the law, but that they should be conducted with entire fairness. Perfect freedom from all influences likely to prevent competition in the sale should in all cases be strictly exacted. The owner is seldom present, and is generally ignorant of the proceeding until too late to prevent it. The tax usually bears a very slight proportion to the value of the property; and thus a great temptation is presented to parties to exclude competition at the sale, and to prevent the owner from redeeming when the sale is made. The proceeding, therefore, should be closely scrutinized, and, whenever it has been characterized by fraud or unfairness, should be set aside, or the purchaser be required to hold the title in trust for the owner.”³ Such is the language of the federal supreme court in a case in which the purchaser of land at a tax-sale had contrived to prevent competition by the representation that the owner of the land would defeat the sale by redemption. The court, very properly and justly, held the sale to be void as

¹ *Dudley v. Little*, 2 Ohio 504.

² As in *Brown v. Hogle*, 30 Ill. 119, where the treasurer, in making sale, permitted favored persons to go

through his list and select in advance the lands they would purchase.

³ *Field, J.*, in *Slater v. Maxwell*, 6 Wall. 268, 276. See also *Kerwer v. Allen*, 31 Iowa 578.

a fraud, following in this regard an early case in Ohio, where a combination between bidders to preclude competition was also held fatal to the sale.¹

A sale, however, is not necessarily void because of the absence of competition, if it is publicly made and no devices are resorted to in order to prevent bidding.² And it is not necessarily illegal because a principal and his agent are both bidding,³ or because one man is bidding for two with an understanding that bids for one are not to be bids against the other.⁴ But any act on the part of the officer which tends to prevent fair competition will be fatal to the sale,⁵ and so will the absence of competition if brought about by the tacit understanding of bidders,⁶ or by their agreement to take turns in bidding.⁷ But

¹Dudley v. Little, 2 Ohio 504. In Bickford v. Poor, 68 N. H. 443, a sale was held invalid because of statements made by the purchaser at the time of the sale in order to prevent competition.

²Beeson v. Johns, 59 Iowa 166; Gallaher v. Head, 108 Iowa 588.

³Jury v. Day, 54 Iowa 573.

⁴Pearson v. Robinson, 44 Iowa 413. No combination to prevent competition at a tax-sale is to be inferred from the mere fact of a joint purchase by two persons of tracts of land struck off at such sale: Kerr v. Kipp, 37 Minn. 25.

⁵Townsend, etc. Bank v. Todd, 47 Conn. 190. Tax-collector's statement at sale that he hoped no one would bid more than the amount of taxes, interest, and charges, because of the inconvenience of disposing of the surplus, was held not to render the sale void: Southworth v. Edmands, 152 Mass. 203. Where a county treasurer, who as mortgager had agreed to pay the taxes, falsely told the mortgagee that the taxes were paid, and thus by collusion had a third person bid off the land at a sale for such taxes, the sale was held void

for fraudulent conspiracy: Christian v. Soderberg, 118 Mich. 47.

⁶Singer Manuf. Co. v. Yarger, 12 Fed. Rep. 487; Johns v. Thomas, 47 Iowa 441; Frank v. Arnold, 73 Iowa 370; Merrett v. Coulter, 96 Mo. 237. In Howland v. Pettey, 15 R. I. 603, where the former owner asked to have a sale set aside because the price received was inadequate owing to an understanding among the bidders that he was to get the land back on his reimbursing the purchaser for the price paid and costs, it was held that such an undertaking was not prejudicial to the complainant, he having been offered the land by the purchaser for the price paid with costs and expenses, which offer he did not accept, though able to do so, and he never having offered to redeem the land. In Morrison v. Bank of Commerce, 81 Ind. 335, it was held that holders of separate judgment liens upon the lands sold may, for the purpose of protecting the liens and preventing an adverse lien from attaching, agree to bid off the land. Such agreement does not necessarily prevent competition among bidders though there is none between the

⁷Springer v. Bartle, 46 Iowa 688; Frank v. Arnold, 73 Iowa 370.

the invalidity in these cases is not absolute as in case of a sale without jurisdiction; it is rather a cause for avoiding the sale than a cause which *ipso facto* defeats it; and if before the proper remedy is sought the land comes to the hands of a *bona fide* purchaser who was ignorant of the fraud, he will be protected in his title.¹ Perhaps also the purchaser at the sale should be protected if he did not participate in the fraud and was unaware of it.²

Officer not to buy. In order that there may be free competition, it is essential that the officer who makes the sale should act as salesman only, and not become interested in the purchases. He cannot be allowed to occupy the inconsistent positions of purchaser and seller, in which his cupidity would draw him in one direction and his duty in another. The law cannot safely intrust the securities which are devised for the protection of private parties to the care of those who are interested to prevent their accomplishing the purpose for which they are provided. No provision of law, it is believed, would ever be made which would allow official integrity to be subjected to the trial of such conflicts between interest and duty as would be sure to arise if the officer were allowed to bid at a sale where his duty would be to obtain the highest practicable bid in the interest of another, while his interest would be so to manage as to obtain the lowest. For the officer voluntarily to put himself in that position is regarded as a fraud on his part upon the law; and on grounds of general public policy, the sale which he makes to himself is void.³ On no other principle can integrity and good

lien holders; but for the protection of their own interests they may control competition among themselves. "They were under no obligation to bid against each other, and their omission to do so, whether by agreement or otherwise, if not done for the purpose of preventing competition among bidders, will not impair the validity of such sale."

¹ See *Sibley v. Bullis*, 40 Iowa 429; *Watson v. Phelps*, 40 Iowa 482; *Huston v. Markley*, 49 Iowa 162; *Martin v. Ragsdale*, 49 Iowa 589.

² In *Case v. Dean*, 16 Mich. 12, it

was decided that such a combination between bidders would not defeat the title of a purchaser who was not a party to or shown to be aware of it. See also *Boyd v. Wilson*, 86 Ga. 379; *Martin v. Cole*, 38 Iowa 141. In *Reeve v. Kelly*, 43 Cal. 643, it was held that a sale could not be attacked collaterally for fraud in obtaining it: *Reeve v. Kennedy*, 43 Cal. 642.

³ *Spicer v. Rowland*, 39 Kan. 740; *Sponable v. Woodhouse*, 48 Kan. 173; *Straus v. Head* (Ky.), 21 S. W. Rep. 537; *Payson v. Hall*, 30 Me. 319; *Pierce v. Benjamin*, 14 Pick. 356;

faith be secured in proceedings of this *ex parte* character. It has even been held that an officer has no right to buy for the county unless expressly authorized by law.¹

Clute v. Barron, 2 Mich. 192; *McLeod v. Burkhalter*, 57 Miss. 65; *Chandler v. Moulton*, 33 Vt. 245; *Taylor v. Stringer*, 1 Grat. 158; *Phillips v. Minear*, 40 W. Va. 58. A tax-deed made on a purchase of land by a partnership at a sale by one of the partners as deputy collector does not constitute color of title in the firm or either partner: *Burns v. Edwards*, 163 Ill. 494. Under a statute providing that no collector shall be concerned in the purchase of land for taxes, a deed to a tax-collector is void: *Maher v. Brown*, 183 Ill. 575. Neither a county treasurer nor his deputy can purchase lands offered for sale for delinquent taxes and bid in by the state: *Wait v. Gardiner*, 123 Mich. 236. See *Youngs v. Povey* (Mich.), 86 N. W. Rep. 809. In Iowa county treasurers are forbidden from being "concerned in the purchase" of tax-titles, and this avoids a sale where the treasurer procured a third person to bid off the land as an investment for the treasurer's minor son: *Kirk v. St. Thomas Church*, 70 Iowa 287. But in that state a sale in which the treasurer is "concerned" is voidable only, so that the right to set it aside may become barred by the statute of limitations: *Lawrence v. Hornick*, 81 Iowa 193. The Wisconsin statute prohibiting county treasurers from becoming "interested in the purchase of any property sold . . . at . . . tax-sale, or in the purchase of any tax certificates," applies to certificates issued before the treasurer assumed office: *Gilbert v. Dutruit*, 91 Wis. 661. In West Virginia the sheriff is required to append to the list of lands sold by him an affidavit that he

"is not now nor has he at any time been, directly or indirectly, interested in the purchase of any" of such lands; and the omission of substantial parts of the required statement has been held fatal to the sale: *Jackson v. Kittle*, 34 W. Va. 207; *Hays v. Heatherly*, 36 W. Va. 613; *Baxter v. Wade*, 39 W. Va. 281; *Phillips v. Minear*, 40 W. Va. 58; *McLain v. Batton*, 50 W. Va. 121. In Kansas an officer's payment under his attempted purchase does not divest the state's lien, or operate as a payment for the lot-owner's benefit; what he pays is forfeited to the state while the tax remains a charge as before: *Haxton v. Harris*, 19 Kan. 511. See *Harris v. Drought*, 24 Kan. 524. Nor can such money be recovered back by the treasurer from the county, or from the owner of the land: *Sponable v. Woodhouse*, 48 Kan. 173. In Arkansas, if a sale made to an officer is set aside he is entitled to be reimbursed what he paid, and interest: *Cole v. Moore*, 34 Ark. 582. In Iowa the officer selling cannot act as agent for others in buying; though, if he does so, and the purchase is afterwards set aside on that ground, the owner must refund to the purchaser what he has paid: *Everett v. Besbe*, 37 Iowa 452. The next day after land had been sold for delinquent taxes by a county treasurer who was also a junior mortgagee, the purchaser, under an arrangement made after the execution and delivery of the tax-deed, quit-claimed to the junior mortgagee in his individual capacity; and it was held that the latter acquired a good title free from the senior mortgagee's lien: *Safe-Deposit, etc. Co. v. Wickhem*, 9 S. D. 341. That the purchaser

¹ *Wilkins v. Benning*, 51 Ga. 9.

There are cases which hold that the principle above referred to does not preclude a clerk or a deputy of the officer who makes the sale from becoming a purchaser, if such clerk or deputy has nothing to do with the sale.¹ And where the sale is by the sheriff, a purchase by the tax-collector has been held not to be contrary to public policy.²

Order of sale. Sometimes the statute requires the particular tracts or parcels of land to be offered for sale in the order in which they are described in the delinquent list or in the judgment of sale.³ It has been held that where lots had been sold for taxes assessed subsequently to taxes for which it was proposed to sell those lots and also others, the purchaser of the former was entitled to have the others sold first if there were no intervening equities.⁴ And a sale will be void if a requirement that first one tract shall be offered for all the taxes, and then two tracts for all, and so on, is disregarded.⁵

at a tax-sale, after receiving a deed, conveyed to the person who was county treasurer at the time of the tax-sale, and deputy treasurer at the time of the conveyance to him, was held not to show fraud in the issue of the tax deed: *Shelley v. Smith*, 97 Iowa 259. And in *New Orleans Pac. R. Co. v. Kelly*, 52 La. An. 1741, a tax-sale was not annulled on the ground that four years after it was made the officer who made it acquired an interest from the purchaser; no fraud being shown.

¹ *Hare v. Carnall*, 39 Ark. 196; *Wells v. Jackson Manuf. Co.*, 47 N. H. 235; *Fox v. Cash*, 11 Pa. St. 207. See *O'Reilly v. Holt*, 4 Woods 645. That a deputy of the tax-collector, after the land had been bid off by a third person at a tax-sale, purchases an interest therein from such purchaser, the tax-deed being made to them jointly, does not invalidate the sale: *Mixon v. Clevenger*, 74 Miss. 67. After the expiration of the time for redemption of lands held by the state for taxes, the clerk of the land department of the office of the au-

ditor of public accounts has as much right to purchase at the sale as any one: *Browne v. Carlisle*, 62 Miss. 595. But see *Wait v. Gardiner*, 123 Mich. 236.

² *Walcott v. Hand*, 122 Mo. 621; *Turner v. Gregory*, 151 Mo. 100.

³ Under a statute requiring the collector, on a sale for taxes, "to offer for sale separately and in consecutive order each tract of land or town or city lot in the said list," etc., the collector, where there are in the same town two lists, one for general taxes and one for special assessments, may dispose first of whichever list he sees fit: *Drake v. Ogden*, 128 Ill. 603. Under the curative statute in Minnesota, non-compliance with the statutory provision requiring each piece or parcel of land to be offered for sale in the order in which it was described in the judgment would not by itself, avoid a sale: *Cook v. Schroeder Lumber Co. (Minn.)*, 88 N. W. Rep. 971.

⁴ *Thorrington v. Montgomery*, 82 Ala. 591.

⁵ *Gregory v. Brogan*, 74 Miss. 694.

Sale in separate parcels. The sale should also be made of the parcels of land as they appear in the list. This is the general rule.¹ Exceptions are made by statutes for various reasons. Where a tract is capable of subdivision, the statute may authorize the owner of a part to relieve such part from liability by paying a proportionate part of the tax.² Under some statutes, any one who will distinctly define any portion of an unimproved tract of land may pay the tax upon that portion. So statutes permit the owner or claimant of an undivided interest to pay upon that by itself.³ In any of these cases the part of

¹ *Shaw v. Kirkwood*, 24 Kan. 476; *Kregolo v. Flint*, 25 Kan. 695; *Hayden v. Foster*, 13 Pick. 492; *Farnham v. Jones*, 32 Minn. 7; *Brown v. Setzer*, 39 Minn. 317; *State v. Sargeant*, 76 Mo. 557; *Bays v. Trulson*, 25 Or. 109; *Brentano v. Brentano (Or.)*, 67 Pac. Rep. 922; *Salmer v. Lathrop*, 10 S. D. 216. Under a statute requiring land to be assessed by a description sufficient to identify it, a sale for taxes describing the land as an undivided portion of the south middle 31 and two-twelfths feet of a certain lot, the lot not being capable of fractional divisions of the size mentioned, is void for uncertainty: *Hintrager v. Nightingale*, 36 Fed. Rep. 847. A sale of land described as "thirty-seven acres in the north half of section one" is void for uncertainty: *Nelson v. Abernathy*, 74 Miss. 164. A sale of "eighty-four feet of this lot" conveys nothing: *Wands v. O'Brien*, 13 Lea 732. A sale of "115 x 238 feet, corner of C and 6th streets, section 20, town 23, range 4, west, city of La Fayette," is too defective to convey title, but passes the tax-lien: *Ball v. Barnes*, 123 Ind. 394. The land sold for taxes need not be described by metes and bounds. A description is sufficient which shows the location of the premises: *Textor v. Shipley*, 86 Md. 424. Use of abbreviations: *Riddle v. Messer*, 84 Ala. 236.

² See *Fellows v. Denniston*, 23 N. Y. 420.

³ Where a quarter section is wrongly assessed as one parcel, the owners of distinct parcels of it may pay the taxes on their parcels, leaving the remainder to be sold: *Lawrence v. Miller*, 86 Ill. 502; *Pennell v. Monroe*, 30 Ark. 661. But the officer cannot receipt as for undivided interests in such a case, where the ownerships are in severalty: *Lawrence v. Miller*, *supra*. Where the owner of an undivided interest is permitted to pay on that interest, a sale of the remaining interest is valid: *Peirce v. Weare*, 41 Iowa 378. Where one owned an undivided one-half of certain land, and failed to pay taxes due on it, an assessment and sale of the number of acres he owned in survey did not invest the purchaser with his interest and subordinate such purchaser to an undivided one-half interest in the land with the other owner; and he is not entitled to the assistance of equity to aid a defective conveyance: *Morgan v. Smith*, 70 Tex. 637. Without express statutory authority undivided interests cannot be sold separately when the tract is assessed as an entirety: *Roberts v. Chan Tin Pen*, 23 Cal. 259; *Cragin v. Henry*, 40 Iowa 158. It would be otherwise if the statute provided for the sale of undivided interests after the tax on

the land, or the interest in the land, upon which the tax is not paid, remains subject to sale and may be sold by itself. But in other respects the listing is to be followed in the sale.¹ To group lands in the sale which are assessed as separate interests

other interests had been paid. If sale of part of a tract is enjoined, the remainder, it seems, may be sold separately: *Lane v. March's Succession*, 33 La. An. 554. A tax-sale of a fractional part of a tract of land is not rendered invalid by the fact that the list of lands advertised for sale shows that bids were made for a definite quantity of land and not for an undivided part, if the tax-sale record shows the bid to have been for an undivided interest; and it need not appear in what part of the tract such fractional part is, as only an undivided interest is sold: *Jenswold v. Doran*, 77 Iowa 692. Under a statute providing that only the estate liable for the taxes should be sold, a sale not affecting any part of the interest of a mortgagee of one of two remainder-men was illegal, because casting too great a burden on the interests of the life-tenant and the other remainder-man: *Weaver v. Arnold*, 15 R. I. 53. To sell one's "right, title, and interest" in land is not equivalent to a sale of the land itself: *Clarke v. Strickland*, 2 Curt. C. C. 439. In Vermont it appears that a collector's deed describing the land simply as so many acres of a large lot passes an undivided interest in such lot equal to the proportion which the number of acres sold bears to the whole number of acres in the lot: *Sheafe v. Wait*, 30 Vt. 735. Prior sale of leasehold interest provided collector has "actual notice:" *Baltimore v. Whittington*, 78 Md. 231.

¹ *Ballance v. Forsyth*, 13 How. 18; *Walker v. Moore*, 2 Dill. 256; *Atkins v. Hinman*, 2 Gilm. 437; *Spellman v. Curtenius*, 12 Ill. 409; *Pitkin v. Yaw*,

13 Ill. 251; *Penn v. Clemans*, 19 Iowa 372; *Ware v. Thompson*, 29 Iowa 65; *Martin v. Cole*, 38 Iowa 141; *Moulton v. Blaisdell*, 24 Me. 283; *Wallingford v. Fiske*, 24 Me. 386; *Andrews v. Senter*, 32 Me. 394; *Hayden v. Foster*, 13 Pick. 492; *Baskins v. Winston*, 24 Miss. 431; *State v. Richardson*, 21 Mo. 420; *Willey v. Scoville*, 9 Ohio 43; *Morton v. Harris*, 9 Watts 319; *Woodburn v. Wireman*, 27 Pa. St. 18. Where there is a joint assessment of certain lots at one valuation for the whole, and a separate sale of each by the tax-collector, such tax-sale is void: *House v. Gumble & Co.*, 78 Miss. 259. Where a tract or lot of land is assessed as an entirety, the sale of a part of it for part of the tax is voidable: *Heil v. Redden*, 38 Kan. 225; *Roberts v. First Nat. Bank*, 8 N. D. 504. Adjoining lots assessed at one lump sum must be sold as a whole: *O'Neil v. Tyler*, 3 N. D. 47. The sale of an entire lot for a tax based on an assessment of only a part is void: *Reems v. Recorder*, 47 La. An. 1138. In Minnesota, where an assessment was of a whole block, the sale could not be in parcels: *Moulton v. Doran*, 10 Minn. 67. A sale of a mine for tax assessed thereon and on improvements not situated upon the land which included the mine, such sale being for a sum in excess of what either mine or improvements were singly liable for, held invalid: *Knox v. Higby*, 76 Cal. 264. In *Spalding v. Watson*, 35 Kan. 39, a tax-sale was not declared void simply because it was of one-half of a quarter section, the other half belonging to the same person. The officer must sell an undivided interest where such was the interest assessed: *Har-*

is incompetent, even though they be owned by the same person.¹ Each parcel is chargeable with its own taxes, and is to be redeemed by paying them; but such a joint sale charges it with the tax upon the other also, and is like issuing one execution upon several judgments, and selling jointly the lands which are charged with separate liens.² It may or may not be

per v. Rowe, 55 Cal. 132. In Pennsylvania the sale of seated lands with unseated is void for want of jurisdiction: Dietrick v. Mason, 57 Pa. St. 40. Unseated lands are sold without regard to ownership: Reading v. Finney, 73 Pa. St. 467. See Cuttle v. Brockway, 32 Pa. St. 45. In New York it is held competent, where distinct interests are held subject to a lien for taxes, to provide by statute for a judicial sale of the whole fee, on the application of one party, after publication of notice to unknown owners: Jackson v. Babcock, 16 N. Y. 246. It is held in Alabama that sale may be made of a segregated portion of an operated railroad for non-payment of taxes assessed upon the railroad as land: Purifoy v. Lamar, 112 Ala. 123.

¹Cocks v. Simmons, 55 Ark. 104; Levy v. Ladd, 35 Fla. 391; Hintrager v. McElhinny, 112 Iowa 385; Wyer v. Larocque, 51 Kan. 710; Norres v. Hayes, 44 La. An. 907; Andrews v. Senter, 32 Me. 394; Hayden v. Foster, 13 Pick. 492; Barnes v. Boardman, 149 Mass. 106; Gilfillan v. Chatterton, 38 Minn. 335; Griffin v. Ellis, 63 Miss. 348; Speed v. McKnight, 76 Miss. 723; Higdon v. Salter, 76 Miss. 766; Yeamans v. Lepp (Mo.), 66 S. W. Rep. 957; Casey v. Wright, 14 Mont. 315; Hasbrouck Heights Co. v. Township Committee (N. J.), 48 Atl. Rep. 517; Bays v. Trulson, 25 Or. 109; Brentano v. Brentano (Or.), 67 Pac. Rep. 922; Woodburn v. Wireman, 27 Pa. St. 18; Salmer v. Lathrop, 10 S. D. 216; Tucker v. Whittlesey, 74 Wis. 74.

See Crane v. Randolph, 30 Ark. 579; Rankin v. Miller, 43 Iowa 11. Though a sale together of several lots which really constitute one tract may be good, yet this can only be so when they were assessed together, or when they constitute a definite portion or fraction of what was assessed, so that by mere division or subtraction the amount of tax chargeable on the property sold can be determined from the assessment roll: McQuesten v. Swope, 12 Kan. 32. In Wisconsin the sale of several governmental subdivisions together is a mere irregularity which does not go to the groundwork of the tax: Pier v. Prouty, 67 Wis. 218.

²National Bank v. Baker Hill Iron Co., 108 Ala. 635; Salinger v. Gunn, 61 Ark. 414; Hall v. Dodge, 18 Kan. 277; Mathews v. Buckingham, 22 Kan. 166; Yeamans v. Lepp (Mo.), 66 S. W. Rep. 957; Philadelphia v. Meighan, 159 Pa. St. 495. Where a sale of distinct parcels as an entirety is invalid, the question whether the land is to be regarded as one or more parcels is not always determined merely by the usual description of the land; its use and nature control the description; and lots described as lots 2 and 3 in a town may be sold as one parcel if inclosed, built upon, and occupied as one: Weaver v. Grant, 39 Iowa 294. See Greer v. Wheeler, 41 Iowa 85. The fact that a piece of land advertised and sold for taxes as one lot was separated into six lots by stone walls does not invalidate the sale where the tract as a whole is correctly described: How-

important to the owner that he have the opportunity of a separate redemption, but the fact that it possibly may be so is sufficient reason why the law should protect the right. But where parcels are separately sold, there is no objection to their being united in one conveyance if purchased by the same person, and their being so joined raises no presumption that they were not separately sold.¹

land v. Pettey, 15 R. I. 603. Three adjoining lots of land, taxed, held, and used as one property, may be sold together: Jones v. Landis T'p. 50 N.J. L. 374. Where several platted lots have been properly assessed as one description (and the entry of decree against such a description as one parcel is a determination of the legality of the assessment), and where the tax has been extended against the description as a whole, it is proper to treat it as one parcel in subsequent proceedings: Kneeland v. Hull, 116 Mich. 55. The term "tract" or "lot" in tax-laws defined: Yeamans v. Lepp (Mo.), 66 S. W. Rep. 957. Where a quarter section of land is owned by one person, the assessment and sale thereof as a whole is not in violation of a statutory provision that land shall be assessed and sold in separate tracts: Land, etc. Imp. Co. v. Bordon, 45 Fe l. Rep. 706. In Illinois it seems that if distinct tracts belonging to one person are offered separately and no bids received, then two may be offered together, even though not adjoining: Douthett v. Kittle, 104 Ill. 356. See Slater v. Maxwell, 6 Wall. 268. It will not be presumed, against the regularity of tax-sales, that several tracts on one list were in different beats: Lowe v. Martin, 79 Ala. 366. If a deed shows that several parcels were sold together in bulk, and that they are separate and non-contiguous tracts, the deed is void on its face: Cartwright v. McFadden, 24 Kan. 662. See Farnham v. Jones, 32 Minn. 7. Where the statute re-

quires a sale to be in parcels not larger than forty acres, it must be followed strictly: Clarke v. Rowan, 53 Ala. 400. A sale by forty-acre lots when the sheriff at the time they are offered fails to designate what forty-acre lot he is selling is void: Nelson v. Abernathy, 74 Miss. 164. And a sale by a tax-collector of a 300-acre lot in a parcel instead of in forty-acre parcels as required by the statute, vitiates the sale, even though there never had been a subdivision by government survey of the section containing the lot: Herring v. Moses, 71 Miss. 620. Under the Minnesota statutes a certificate including several tracts must show that each tract was separately bid off at a certain price, in the manner required; and one reciting that all property described in it (several separate tracts) was sold for a lump sum, purports a sale *en masse*, and is void: Brown v. Setzer, 39 Minn. 317, following Farnham v. Jones, 32 Minn. 7. It seems that in selling for a federal tax, if the officer acts in good faith, the sale is not void because of a joint sale of two parcels: Springer v. United States, 102 U. S. 586. See Keely v. Saunders, 99 U. S. 441. The New York statutory requirement that contiguous lots belonging to the same owner shall be sold in one parcel does not apply to lots assessed to different occupants, unless some proof of joint ownership is given: People v. Cady, 105 N. Y. 299.

¹ Waddingham v. Dickson, 17 Colo. 223; Crisman v. Johnson, 23 Colo.

Surplus moneys. Various methods are adopted in different states to save, if possible, something to the owner when his land is sold. One of these is, to have the land put up for sale for what it will bring, and if the bid exceeds the tax, with interest and expenses, require the surplus to be deposited in the state or county treasury for the benefit of the party who shall show his right.¹ Another is to require a bond to be given by the purchaser to account for the excess over the taxes and charges, which bond shall be a lien on the land.² Still another

264; *Stieff v. Hartwell*, 35 Fla. 606; *State v. Jordan*, 36 Fla. 1; *Barnett v. Jaynes*, 26 Colo. 279; *Watkins v. Inge*, 24 Kan. 612; *Towle v. Holt*, 14 Neb. 221; *Bennett v. Darling* (S. D.), 86 N. W. Rep. 751. And if two tracts are deeded as one parcel the deed may be supported by evidence that they were separately sold, or that they were sold because occupied as one: *Greer v. Wheeler*, 41 Iowa 85. A misdescription of one parcel of land in a deed does not affect the deed as to the remainder: *Watkins v. Inge*, 24 Kan. 612. In Arkansas it is said that if two parcels are sold separately they may be embraced in the same conveyance, but the deed should show the separate sales: *Pack v. Crawford*, 29 Ark. 489; *Pettus v. Wallace*, 29 Ark. 476; *Montgomery v. Birge*, 31 Ark. 491.

¹ The law directing an entire tract to be sold for delinquent taxes and not providing for the sale of any fractional part thereof, but reserving the surplus for the land-owner, does not violate any conditional provision: *Shuttuck v. Smith*, 6 N. D. 56. As to the land-owner's right to any surplus, see *Workingmen's Bank v. Lannes*, 30 La. An. 871. The mortgagee of premises sold for taxes was held entitled to the surplus of the price above the taxes due on the expiration of the time to redeem: *Sutherland v. Brooklyn*, 156 N. Y. 605. A provision that a petition for a surplus may be filed in two years

from the time the sale is publicly consummated, means two years from the date of the decree of confirmation of sale, not from the date of the decree directing the sale: *Thompson v. Cox*, 42 W. Va. 566. If land is sold to the United States for a federal tax and bid in for more than is due, the United States are liable to the land-owner for the surplus: *United States v. Lawton*, 110 U. S. 146. As to who could claim surplus proceeds in federal treasury, see *Elliott v. United States*, 20 Ct. of Cl. 328; *Rhett v. United States*, 20 Ct. of Cl. 338; *Rodgers v. United States*, 21 Ct. of Cl. 130; *Wilson v. United States*, 21 Ct. of Cl. 135; *Paynter v. United States*, 21 Ct. of Cl. 221. A tax-collector cannot retain in his hands the money paid at a tax sale which may be pronounced null: *Brown v. Ponchartain*, 49 La. An. 1779. Sale ratified by accepting surplus: *Clyburn v. McLaughlin*, 106 Mo. 521. Not material that taxpayer does not appear in person to receive surplus where he deposes the treasurer to receive such surplus for him: *State v. Lancaster*, 46 S. C. 282.

² *Loud v. Penniman*, 19 Pick. 539; *People v. Hammond*, 1 Doug. (Mich.) 276; *Peters v. Heasley*, 10 Watts 208. The giving of the surplus bond is a condition precedent to the passing of the title to the purchaser at the tax-sale: *Sutton v. Nelson*, 10 S. & R. 238; *McDonald v. Maus*, 8 Watts 364; *Donnel v. Bellas*, 10 Pa. St. 341;

is to require so much only of the land to be sold as may be requisite to satisfy the tax and charges, either prescribing a general rule as to where the parcel sold shall be taken off, or allowing a discretion to the officer in that regard.

*Excessive sale.*¹ It has been said that in the absence of any statute limiting the officer's right to sell, to so much as would be requisite to pay the tax and charges, a restriction to this extent would be intended by the law.² Whether this is so or not is perhaps not very material, as it is not for a moment to be supposed that any statute would be adopted without this or some equivalent provision for the owner's benefit. And such a provision must be strictly obeyed. A sale of the whole when less would pay the tax would be such a fraud on the law as to render the sale voidable at the option of the land-owner,³ and the

Cutler v. Brockway, 24 Pa. St. 145; Woodland Oil Co. v. Shoup, 107 Pa. St. 293. That there is no presumption such a bond was given, where the taxpayer does not take possession or pay taxes, see Alexander v. Bush, 46 Pa. St. 62. As to suit upon the bond, see Crawford v. Stewart, 38 Pa. St. 34.

¹ As to excessive taxes, see *ante*, pp. 589-593.

² Townsend, etc. Bank v. Todd, 47 Conn. 190; O'Brien v. Coulter, 2 Blackf. 421; Margraff v. Cunningham's Heirs, 57 Md. 585. In Bigger v. Ryker (Kan.), 63 Pac. Rep. 740, a statutory provision which permits the selling of the whole of a tract of land for taxes when a smaller part might suffice to pay them is sustained. In Martin v. Snowden, 18 Grat. 100, 145, language denying such power is used, but, as observed in Bigger v. Ryker, *supra*, the judge writing the majority opinion expressly states that he does not think it necessary to decide the question. See Downey v. Nutt, 19 Grat. 59.

³ Stead's Executors v. Course, 4 Cranch 403; Mason v. Fearson, 9 How. 248; French v. Edwards, 13

Wall. 506; Commercial Bank v. Sandford, 99 Fed. Rep. 154; Morris v. Davis, 75 Ga. 169; Workingmen's Bank v. Lannes, 30 La. An. 871; Norres v. Hays, 44 La. An. 512; Gulf States L. & I. Co. v. Fasnacht's Succession, 47 La. An. 1294; Bristol v. Murff, 49 La. An. 357; Loomis v. Pingree, 43 Me. 299; Lovejoy v. Lunt, 48 Me. 377; French v. Patterson, 61 Me. 203, 210; Whitmore v. Learned, 70 Me. 276; Straw v. Poor, 74 Me. 53; Crowell v. Goodwin, 3 Allen 535; Baskins v. Winston, 24 Miss. 481; Corrigan v. Schmidt, 126 Mo. 304; Ainsworth v. Dean, 21 N. H. 400; Lyford v. Dunn, 32 N. H. 81; Jaquith v. Putney, 48 N. H. 138; Avery v. Rose, 4 Dev. 549; Love v. Wilbourn, 5 Ired. 344; Eastman v. Gurrey, 15 Utah 410. If the statute requires the land to be sold to the person who will pay taxes, interest, and charges for the smallest portion of the land, the officer must sell accordingly, and cannot substitute a different sale: Carpenter v. Gann, 51 Cal. 193; Hewell v. Lane, 53 Cal. 213; Mora v. Nunez, 7 Sawy. 455. And under such a statute a sale to the highest bidder is simply void: Reynolds v. Lincoln, 71

deed would be void on its face if it showed the fact of such excessive sale.¹ So a sale of the remainder after the tax had been satisfied by the sale of a part would also be void, for the very plain reason that the power to sell would be exhausted the

Cal. 183. The officer's statement that he offers any portion of the land that one will buy is not a sufficient compliance with the requirement that he sell the least quantity which will bring the unpaid taxes: *Gulf States L. & I. Co. v. Fasnacht's Succession*, 47 La. An. 1294. Where the sale is to be of the smallest quantity of land, the officer must still sell an undivided interest, where such was the interest assessed: *Harper v. Rowe*, 55 Cal. 132. If the entire land is sold, the deed should show that this became necessary: *Brookings v. Woodin*, 74 Me. 222. Under the Massachusetts statute providing that if an estate is capable of division the collector may sell so much thereof as would be sufficient to discharge the taxes and intervening charges, it must appear by the collector's deed or otherwise that the land was so divided that no greater part was sold than was necessary to satisfy the tax and charges, or that it could not be divided conveniently to that extent: *Crowell v. Goodwin*, 3 Allen 535. Undivided interests are not sold under this statute: *Wall v. Wall*, 124 Mass. 65; *Sanford v. Sanford*, 135 Mass. 314. A provision that "the collector may designate" what portion of land shall be sold leaves it in his discretion to sell either part or the whole: *Doland v. Mooney*, 79 Cal. 137; *Hewes v. McLellan*, 80 Cal. 393. It was held in Arizona that a provision that if the owner fails to designate what portion he wishes sold, "the collector may designate it" is mandatory, and is not complied with by the inquiry at the sale "who will take the

lowest quantity of said block with the improvements, and pay the taxes and costs due?" *Jacobs v. Buckalew* (Ariz.), 42 Pac. Rep. 619. Where a quarter section contained several village lots it was held incompetent to sell off an acre from one side for the tax on the whole: *Balance v. Forsyth*, 13 How. 18. A sale of an entire tract to any one but a county is invalid under the North Carolina statute: *Tucker v. Tucker*, 110 N. C. 333. Under a statute providing that "where any parcel of real estate is liable for payment of taxes, so much thereof as is necessary to pay the tax, interest, costs, and expenses shall be sold by the collector," a sale of the interests of the life-tenant and of the two reversioners, without a sale of the interest of the mortgagee of one reversioner's interest, is void against the other reversioner as charging his interest for more than its proportion of the taxes: *Weaver v. Arnold*, 15 R. I. 53. Under said statute the sale of a strip across the northerly side of one of the lots was held not an unfair mode of sale, calculated to depreciate the price: *Howland v. Pettay*, 15 R. I. 603. Sheriff's neglect to sell only such subdivision as might have been necessary to satisfy the judgment of sale for the taxes was held not available in a collateral action against the purchaser: *Flynn v. Edwards*, 36 Fed. Rep. 873. So it was held in *Wilson v. Cantrell*, 40 S. C. 114, that notwithstanding a statute authorizing sale of only so much as might be necessary to pay the taxes, the sale of an entire tract without an effort to

¹ *Commercial Bank v. Sandford*, 103 Fed. Rep. 98; *Allen v. Morse*, 72 Me. 502.

moment the tax was collected.¹ Where the land is to be struck off to the bidder of the smallest quantity, the law commonly designates where the quantity bid shall be set off. But in Iowa, by thus bidding, the purchaser takes an undivided portion.²

It has been shown in a preceding chapter that an excessive levy is void, whether it is made excessive by including with lawful taxes those which are unlawful, or in any other manner. If the levy should be void, there would of course be nothing to uphold a sale.³ And if a valid levy were to be increased afterwards by unlawful additions, the sale would be equally bad. The statutory power is a power to sell for lawful taxes and lawful expenses, and if it is exceeded by including unlawful items of either class, the power is exceeded and its exercise is invalid *in toto* from the manifest impossibility of saving the sale in part when the invalidity extends to the whole.⁴ Nor

subdivide it, would not, in the absence of fraud or collusion, be invalid. And under the Massachusetts statute allowing the collector to sell, at his option, the whole or any part of the land for taxes, the sale is not void because the whole of the land was sold when a part might conveniently have been sold: *Southworth v. Edmonds*, 152 Mass. 203. See, also, *Leaton v. Murphy*, 78 Mich. 77. Where the land as assessed consists of several distinct parcels constituting one tract, if the several parcels are offered separately and no bids obtained, the whole may then be offered together: *Slater v. Maxwell*, 6 Wall. 268. See *Douthett v. Kittle*, 104 Ill. 356. Under the federal direct tax acts charging each parcel with a distinct tax, a sale of two distinct parcels was not illegal, although the receipts from either were more than enough to discharge the taxes on both: *Lawton v. United States*, 21 Ct. of Cl. 44.

¹ See *Washington v. Pratt*, 8 Wheat. 681; *Mason v. Fearson*, 9 How. 248; *Glos v. Swigart*, 156 Ill. 229.

² *Brundige v. Maloney*, 52 Iowa 218.

³ See *ante*, pp. 589-593. Including

salaries of town officers in the tax-levy of a village corporation renders the tax illegal, and a sale under a judgment for non-payment thereof void; and such a case is within the exception providing that the judgment for sale shall not be conclusive as to a title based thereon where the land was not liable to the tax: *Drake v. Ogden*, 128 Ill. 603; *Gage v. Goudy*, 141 Ill. 215. A tax-deed is void if the tax for which the sale was made was excessive and void; as when the tax was for a sum illegally allowed to a judge for extra compensation: *Culbertson v. Witbeck Co.*, 127 U. S. 326. The mere fact that in a given year there was a levy of two per cent. in a county where, by statute, the board could not levy a tax greater than one per cent., is not sufficient to avoid a deed for land sold for non-payment of taxes assessed on such levy, since the same statute allows a greater levy if it be authorized by a direct vote of the taxpayers, and it must be presumed that public officers perform their duty as the law requires: *Bergman v. Bullitt*, 43 Kan. 709.

⁴ *Pack v. Crawford*, 20 Ark. 489; *Cooper v. Freeman Lumber Co.*, 61

can the maxim *de minimis* be applied so as to prevent a slight excess from invalidating the sale.¹ It is to be presumed, when the sale has been made for a sum in part illegal, that some undefined and undefinable portion of the land has gone to satisfy

Ark. 36; Hardenburgh v. Kidd, 10 Cal. 402; Bucknall v. Story, 36 Cal. 67; Treadwell v. Patterson, 51 Cal. 637; Harper v. Rowe, 53 Cal. 233; Axtell v. Gerlach, 67 Cal. 483; Simmons v. McCarthy, 118 Cal. 625; Miller v. Williams (Cal.), 67 Pac. Rep. 788; Cramer v. Armstrong (Colo.), 66 Pac. Rep. 889; Graham v. Florida, L. & M. Co., 33 Fla. 356; Gage v. Williams, 119 Ill. 563; McQuilkin v. Doe, 8 Blackf. 581; Hutchens v. Doe, 3 Ind. 528; Smith v. Ryan, 88 Ky. 636; Fish v. Genett (Ky.), 56 S. W. Rep. 813; Clifford v. Michiner, 49 La. An. 1511; Hansen v. Maubert, 52 La. An. 1565; Elwell v. Shaw, 1 Greenl. 339; Stockle v. Silsbee, 44 Mich. 561; Burroughs v. Goff, 64 Mich. 464; Dogan v. Griffin, 51 Miss. 782; Beard v. Green, 51 Miss. 856; Shattuck v. Daniel, 52 Miss. 834; Peterson v. Kittredge, 65 Miss. 33; McCann v. Merriam, 11 Neb. 241; Cowell v. Young, 11 Neb. 510; Buttrick v. Nashua-I. & S. Co., 59 N. H. 392; People v. Hagadorn, 104 N. Y. 516; Lee v. Crawford (N. D.), 88 N. W. Rep. 97; Young v. Joslin, 13 R. I. 675; Eastman v. Gurrey, 15 Utah 410; Asper v. Moon (Utah), 67 Pac. Rep. 409. See Cuming v. Grand Rapids, 46 Mich. 150; McQuesten v. Swope, 12 Kan. 32. A tax-sale is void if the tax is made excessive by adding an illegal percentage or item of interest: Bucknall v. Story, 36 Cal. 67; Wattles v. Lapeer, 40 Mich. 324; Silsbee v. Stockle, 41 Mich. 615; Rellstab v. Belmar, 58 N. J. L. 489; Lufkin v. Galveston, 73 Tex. 340. Or where illegal or excessive fees or charges are added: Railroad Co. v. Parks, 32 Ark. 131; Goodrum v. Ayres, 56 Ark. 43; Salinger v. Gunn, 61 Ark. 414; Darter v. Houser, 63

Ark. 475; Muskegon Lumber Co. v. Brown, 66 Ark. 539; Gunther v. Lewis, 24 Kan. 309; Harris v. Curran, 32 Kan. 580; Fox v. Cross, 39 Kan. 350; Blanchard v. Hatcher, 40 Kan. 350; Jackson v. Challis, 41 Kan. 247; Douglas v. Walker, 57 Kan. 328; Benton v. Goodale, 66 N. H. 424; Eustis v. Henrietta, 91 Tex. 325; Olsen v. Bagley, 10 Utah 492. See Doland v. Mooney, 79 Cal. 137; Hewes v. McLellan, 80 Cal. 393; Clarke v. New York, 55 N. Y. Super. Ct. 259. A tax sale will also be void where the judgment upon which it is made includes as costs fees not due, or earned at the time it was rendered, but to accrue subsequently, as costs for selling, etc.: Combs v. Goff, 127 Ill. 431; Gage v. Lyons, 138 Ill. 590; Gage v. Goudy, 141 Ill. 215. As to what are legal costs in a sale, see Harper v. Rowe, 53 Cal. 233. An error in computing an item in the tax at too large an amount is not fatal to the tax-sale where, by another error, another item is decreased, so that the total tax claimed is less than that legally due: Hammond v. Carter, 155 Ill. 579. But it was held in Bump v. Jepson, 106 Mich. 641, that a sale including an illegal interest charge could not be upheld on the ground that the amount for which the land was sold was not in excess of what it would have been had a lawful collection fee which was omitted been added.

¹Cooper v. Freeman Lumber Co., 61 Ark. 36; Salinger v. Gunn, 61 Ark. 414; Simmons v. McCarthy, 118 Cal. 622; Miller v. Williams (Cal.), 67 Pac. Rep. 788; Burroughs v. Goff, 64 Mich. 464; Lee v. Crawford (N. D.), 88 N. W. Rep. 97. In Havard v. Day, 62

an illegal demand, and that such part would not have been sold at all if only what was lawful had been called for.¹ In some states, however, statutes provide that a sale is to be sustained if any one of the taxes for which it was made is valid.² Sometimes, also, it is provided that the sale shall not be invalid though made for an amount in excess of the amount due.³ But in general, the officer must not demand more than is due

Miss. 748, a mistake in the tax-collector's calculation of the amount of several taxes, whereby a sale was made for one and six-tenths of a cent in excess of the legal amount due, was held not to invalidate the sale. So in *O'Grady v. Barnhisel*, 23 Cal. 287, the court, applying the maxim *de minimis*, held that a sale should not be avoided because for \$57.68 instead of \$57.62½, the correct amount. Where in the enforcement of a special assessment tax the notice of the precept for the collection of the tax was for \$32.10 instead of \$32.20, the sale, being for the correct amount, was upheld: *Burt v. Hasselman*, 139 Ind. 196. And in *Drennan v. Beierlein*, 49 Mich. 272, it was said that a slight apparent excess would be presumed legal if it could, under the law, be legal.

¹ *Graham v. Florida, L. & M. Co.*, 33 Fla. 356; *Silsbee v. Stockle*, 44 Mich. 561; *Tillotson v. Webber*, 96 Mich. 144. For a case where the delinquent taxpayer was held not entitled to have a sale certificate set aside because part of the tax was illegal, see *Franz v. Krebs*, 41 Kan. 223. A grantee in a deed agreeing to pay all the taxes due upon the land conveyed only agrees to pay the taxes lawfully due, and may object to excessive taxes, and hence may demand the cancellation of a tax-deed obtained at a sale of the land for taxes, a part of which were excessive: *Cramer v. Armstrong* (Colo.), 66 Pac. Rep. 889. Under the Massachusetts statute providing that no tax-sale

shall be avoided by reason of error or illegality in the assessment, the title of one claiming under a tax-deed is not affected by the fact that part of the sum for which the land was sold was collected for a purpose for which the town could not lawfully raise money: *Southworth v. Edmands*, 152 Mass. 203. The sale should be for all the taxes for which a sale was ordered, else it will be void: *Tillotson v. Small*, 13 Neb. 202; *O'Donohue v. Hendricks*, 13 Neb. 257; *McGavock v. Pollock*, 13 Neb. 536. See *Worthen v. Badgett*, 32 Ark. 496. It was held in *Lancy v. Snow* (Mass.), 62 N. E. Rep. 735, that a tax-sale is not invalid because the property was sold for the taxes of two years at one sale, upon one bid, and for one integral price. In *Crooks v. Whitford*, 47 Mich. 283, it was said that the tax would be presumed legal if it may be so under the statute.

² See *Corning Town Co. v. Davis*, 44 Iowa 622; *Parker v. Cochran*, 64 Iowa 757; *Upton v. Kennedy*, 36 Mich. 215; *Gwynn v. Richardson*, 65 Miss. 222; *Bird v. Sellers*, 113 Mo. 580; *Nehasane Park Assoc. v. Lloyd*, 167 N. Y. 431.

³ *Shuttuck v. Smith*, 6 N. D. 56. In Iowa there is a statutory provision that a tax-sale shall be upheld if any part of the tax for which the sale was made was legal. See *Parker v. Sexton*, 29 Iowa 421. See, also, *Lynde v. Malden*, 166 Mass. 244. And as to sale on a judgment for taxes where the judgment was for more than the proofs justified, see *Reeve v. Kennedy*, 43 Cal. 643.

and make sale accordingly, for if he shall do so the sale will be voidable.¹

Sale to highest bidder. When the law requires the sale to be made to the highest bidder that method must be adopted, and the officer has no discretion to substitute any other.² And as the conveyance must be in execution of a sale actually made, if the sale is made to one man, and by arrangement the deed is made to another, such deed can convey no legal title, though it might, perhaps, be a basis for relief in equity.³

Sale not to be on credit. The sale must be for cash. The officer cannot give credit unless the statute authorizes him to do so.⁴

¹ *Peters v. Heasely*, 10 Watts 208; *Loud v. Penniman*, 19 Pick. 539. A sale of land for taxes assessed jointly on realty and personalty is void: *Stark v. Shupp*, 112 Pa. St. 395. So is a sale for the taxes of several years, one of which has been paid: *Kinsworthy v. Mitchell*, 21 Ark. 145. And see *Douglass v. Short*, 3 Dev. 432. A sale for the tax of the wrong party is void: *Gardner v. Brown*, Meigs 354. Under a statute requiring land sold for taxes to be sold as a whole to the highest bidder, provided the amount bid equals the amount of the taxes, penalty, and costs, a sale to one who was asked to take the least quantity he would accept for paying the taxes, etc., is void, though he refuses to accept less than the whole: *Richards v. Howell*, 60 Ark. 215.

² See *Cardigan v. Page*, 6 N. H. 182; *Bean v. Thompson*, 19 N. H. 290.

³ *Keene v. Houghton*, 19 Me. 368.

⁴ *Cushing v. Longfellow*, 26 Me. 306. Under a statute providing for the sale of lands purchased by the commonwealth at delinquent tax-sales, it was presumed, in view of the settled policy of the state, that cash sales were contemplated: *Brooke v. Turner*, 95 Va. 696. Where

the treasurer took from the purchaser a note instead of cash, the sale was held void, and incapable of being affirmed by the treasurer's receiving payment after leaving office: *Donnel v. Bellas*, 34 Pa. St. 157. See the same case, 10 Pa. St. 341, 11 Pa. St. 341. Unless there is evidence to the contrary it will be presumed that the amount bid was paid when the deed was issued: *Burroughs v. Vance*, 75 Miss. 696. It was held in *Longfellow v. Quimby*, 29 Me. 196, that where the sale was for cash the giving of credit to the purchaser afterwards would not defeat it. In *Leavitt v. Mercer Co. (Neb.)*, 89 N. W. Rep. 426, followed in *Ure v. Bunn (Neb.)*, 90 N. W. Rep. 904, it was said that the statute requiring a purchaser at a tax-sale to make payment forthwith means as soon as the city treasurer is prepared in the usual course of business to receive the moneys, so that where the purchaser's delay was due to the treasurer's inability to accept payment at an earlier date, the sale was not invalidated. Nor is the sale avoided by the officer's delay in executing papers, if in fact no credit is given: *Maina v. Elliott*, 51 Cal. 8. It was held in *Anderson v. Ryder*, 46 Cal.

Sale to include all taxes, etc. It is not infrequently provided by statute that sale shall not be made for less than is sufficient to pay all taxes, costs, etc., that may be due against the land. Such a requirement must, of course, be followed, or the sale will be invalid.¹

Inadequacy of price. The insignificance of the price as compared with the value of the land sold will not defeat a tax-

134, that a deed was not void for non-payment to the sheriff of the purchase-money until some months after the sale, provided the sheriff accepted it. A sale made for cash, without agreement by the officer to wait for the money, was not void by a four days' delay in payment which was for the mutual advantage of the officer and the purchaser: *Judah v. Brothers*, 72 Miss. 616. Treasurer's failure to observe the statute by offering the land again for sale where the purchaser did not forthwith pay his bid, held not to invalidate the taxes: *Green v. Hellman* (Neb.), 90 N. W. Rep. 913. See *Henderson v. Hughes*, 13 S. D. 576. If the purchaser fails to pay within the statutory time, a deed subsequently executed to him by the collector constitutes a cloud on the title which is removable in equity: *Holt v. Weld*, 140 Mass. 578. An action against the bidder at a tax-sale does not lie in behalf of the county treasurer who has paid the amount bid on the owner's refusal to do so: *Sheldon v. Steele*, 87 N. W. Rep. 683.

¹See *Griffin v. Tuttle*, 74 Iowa 219; *Renshaw v. Imboden*, 31 La. An. 661; *Waddill v. Walton*, 42 La. An. 763; *Renick v. Lang*, 47 La. An. 914; *Kohlman v. Glaudi*, 52 La. An. 700; *Millaudon v. Gallagher*, 104 La. An. 113; *Hughes v. Jordan*, 118 Mich. 27; *Detroit F. & M. Ins. Co. v. Wood*, 118 Mich. 31; *Munroe v. Winegar* (Mich.), 87 N. W. Rep. 396;

Hoyt v. Chapin (Minn.), 89 N. W. Rep. 850; *Louisville, N. O. & T. R. Co. v. Buford*, 73 Miss. 494; *Adams v. Osgood*, 42 Neb. 450; *Medland v. Connell*, 57 Neb. 10; *Grant v. Bartholemew*, 58 Neb. 839. In Utah, county commissioners can fix the minimum to be received for property sold at tax-sale to an amount equal to the taxes, interest, and costs: *Heywood v. Board of Com'rs*, 18 Utah 57. Under the Minnesota statute a person obtaining a state assignment of lands bid in by the state at tax-sale must pay interest on subsequent delinquent taxes: *Berglund v. Graves*, 72 Minn. 148. In Iowa a sale for less than all taxes due is not invalid where there are delinquent taxes for previous years: *Kessey v. Connell*, 68 Iowa 430. Under the Kentucky statute providing that if no one at a tax-sale shall bid the amount of the tax and costs, the state shall purchase, it will be presumed, where the sale was to an outsider, that it was at the price of the taxes and costs of collection: *Smith v. Ryan*, 88 Ky. 636. The maxim *de minimis* was applied to a tax-sale where a lot sold for seventy-five cents less than the amount due; and the sale was held valid: *London, etc. Mortg. Co. v. Gibson*, 77 Minn. 394. So, in *Ireland v. George*, 41 Kan. 751, the court refused to set aside a sale, otherwise regular, made for one cent less than the taxes, penalties, and costs allowed by statute.

sale; for if it should, the power to collect revenue by this method would be futile.¹

What passes by the sale. Observing the statutory directions and precautions, and the principles of the common law and of public policy, to which reference has been made, the officer may transfer to the purchaser the full interest in the land which has been assessed, and may convey a complete and perfect title if such is the provision of law on the subject, as in many states is the case.² Indeed, as the chief justice of Massachusetts says in a recent decision, "The prevailing opinion seems to be that a tax-title is a new title, and not merely the sum of old titles."³ Where the whole title is sold it cuts off

¹See *Slater v. Maxwell*, 6 Wall. 268; *Shackleford v. Hooper*, 65 Ga. 366; *O'Brien v. Bradley* (Ind. App.), 61 N. E. Rep. 942; *Nester v. Church*, 121 Mich. 81; *State v. Boyd*, 128 Mo. 130.

²*Turner v. Smith*, 14 Wall. 553; *Osterburg v. Union Trust Co.*, 93 U. S. 424; *Hefner v. Northwestern L. Ins. Co.*, 123 U. S. 747; *Cummings v. Cummings*, 91 Fed. Rep. 602; *De Roux v. Girard's Ex'r*, 105 Fed. Rep. 798, 112 Fed. Rep. 89; *Anderson v. Ryder*, 46 Cal. 134; *Crum v. Cutting*, 22 Iowa 411; *McFadden v. Goff*, 32 Kan. 415; *Fitzpatrick v. Leake*, 49 La. An. 794; *Textor v. Shipley*, 86 Md. 424; *Langley v. Chapin*, 134 Mass. 82; *McLoud v. Mackie*, 175 Mass. 355; *Robbins v. Barron*, 32 Mich. 36; *Sinclair v. Learned*, 51 Mich. 335; *Connecticut Mut. L. Ins. Co. v. Wood*, 115 Mich. 444; *Wass v. Smith*, 34 Minn. 204; *State v. Camp*, 79 Minn. 343; *Paxton v. Valley Land Co.*, 68 Miss. 739; *Eastman v. Thayer*, 60 N. H. 408; *Miller v. Hale*, 26 Pa. St. 432; *Jarvis v. Peck*, 19 Wis. 84; *Sayles v. Davis*, 22 Wis. 225; *Eaton v. North*, 29 Wis. 75. In Georgia, where property sold for taxes is not redeemed within twelve months, the purchaser gets a good title as against the real owners, though it was sold for taxes against a third person:

Dawson v. Dawson, 106 Ga. 45. In North Carolina, since the act of 1891 providing that no sale of real property shall be invalid because land was charged in any other name than that of the rightful owner, a tax-deed duly issued cuts off a prior grantee in fee-simple: *Stanley v. Baird*, 118 N. C. 82. It was held in *Wilson v. Marvin*, 172 Pa. St. 30, that the effect of a tax-sale on the owner's title is not changed by the fact that his refusal to pay the taxes assessed on it as part of a certain warrant was based on an honest though erroneous belief that it was within another warrant on which he paid the taxes. In *Illinois Central R. Co. v. Le Blanc*, 74 Miss. 650, railroad tracks which had been wrongfully laid were held not to have been passed by a tax-sale of the land. As to the rights of a tax-title holder where part-paid school lands have been sold for taxes, see *Larabee v. Prather*, 54 Kan. 743.

³Per *Holmes, C. J.*, in *Emery v. Boston Terminal Co.*, 178 Mass. 172, 184. "If the tax-deed is valid then from the time of its delivery it clothes the purchaser not merely with the title of the person who had been assessed for the taxes and neglected to pay them, but with a new

and divests estates in remainder or reversion,¹ rent charges,² trust estates,³ homestead interests,⁴ mortgages, and other encumbrances,⁵ and even back taxes and tax-titles,⁶ unless other

and complete title in the land, under an independent grant from the sovereign authority, which bars or extinguishes all prior titles and encumbrances of private persons, and all equities arising out of them: "Hefner v. Northwestern L. Ins. Co., 123 U. S. 747, 751. As a tax-deed is not derivative, but creates a new title in the nature of an independent grant by the sovereign authority, extinguishing the patent title, title under a valid tax-deed suffices to enable the holder to question the right of one claiming under a subsequent tax-deed, although it is provided by statute that no person can question the title acquired by a tax-deed without first showing that he or the person under whom he claims had title at the time of the sale: McQuity v. Doudna, 101 Iowa 144.

¹ Cummings v. Cummings, 91 Fed. Rep. 602; Watkins v. Green, 101 Mich. 493; Hazlip v. Nunnery (Miss.), 29 South. Rep. 821.

² Turner v. Smith, 14 Wall. 553; Textor v. Shipley, 86 Md. 424.

³ Lyman v. Hunter, 123 N. C. 508; Summers v. Kanawha County, 26 W. Va. 159. A trustee, where the trust estate has been sold for taxes, has no rights superior to those of others, to be relieved against the sale: Dewey v. Donovan, 126 Mass. 335. See Greenwalt v. Tucker, 8 Fed. Rep. 792. Sale under a judgment for taxes conveys the legal title, subject to the right of a beneficiary in a deed of trust: Myers v. Bassett, 84 Mo. 479.

⁴ Shell v. Duncan, 31 S. C. 547.

⁵ Mixon v. Stanley, 100 Ga. 372; McFadden v. Goff, 32 Kan. 415; In re Douglass, 41 La. An. 765; Fitzpatrick v. Leake, 49 La. An. 794; Robbins v. Barron, 32 Mich. 436; Powell v. Sikes,

119 N. C. 231; Interstate B. & L. Assoc. v. Waters, 50 S. C. 459; Summers v. Kanawha County, 26 W. Va. 159; Jarvis v. Peck, 19 Wis. 84; Sayles v. Davis, 22 Wis. 225; Eaton v. Smith, 29 Wis. 75. For the effect of a local statute on this subject, see Rhein Building Assoc. v. Lea, 100 Pa. St. 210. The purchaser acquires but an inchoate title which does not divest the liens against the taxpayer's land until after the time limited by the act of redemption has passed: Singer's Appeal (Pa.), 7 Atl. Rep. 800.

⁶ Brewer v. District of Columbia, 5 Mackey 274; Shelley v. St. Charles County, 28 Fed. Rep. 875; Anderson v. Ryder, 46 Cal. 134; Chandler v. Dunn, 50 Cal. 15; Law v. People, 116 Ill. 244; Preston v. Van Gorder, 31 Iowa 250; Hough v. Easley, 47 Iowa 330; Phillips v. Wilmarth, 98 Iowa 32; Douglass v. Lowell (Kan.), 67 Pac. Rep. 1106; Wass v. Smith, 34 Minn. 304; State v. Camp, 79 Minn. 343; Meldahl v. Dobbin, 8 N. D. 115; Trego v. Huzzard, 19 Pa. St. 441; Irwin v. Trego, 22 Pa. St. 365, 35 Pa. St. 9. In Georgia the tax-lien is paramount to all other claims, but the officer in selling may sell a part or all of the land, or may sell subject to other liens: Verdery v. Dotterer, 69 Ga. 194. As to preserving the statutory precedence in that state, see Murray v. Bridges, 69 Ga. 644. In Iowa the sale itself operates to pay all prior unpaid taxes, even such as are not included — as they should be — in the sale; and the rule operates as well in favor of the owner who redeems from a sale, as of the owner at the sale: Shoemaker v. Lacy, 45 Iowa 422; Hough v. Easley, 47 Iowa 330; Phillips v. Wilmarth, 98 Iowa 32. In Bowman v. Eckstein, 46 Iowa 583, where a sale had by mis-

provision is made;¹ but in some states the sale is only of the title which the person taxed had at the time,² while in others nothing passes but the title and interest of the parties who were made defendants to the judicial proceedings anterior to

take been made for one tax when it should have included several, and the owner of the record-title bought up the tax-title, this was held to operate as a redemption merely; and the case was distinguished in *Hough v. Easley*, *supra*. In Massachusetts a tax-sale does not operate as a discharge of taxes subsequent to the tax for which it was made, nor does it prevent a sale for them: *O'Day v. Bowker*, 143 Mass. 59; *Keen v. Sheehan*, 154 Mass. 208. See *McAllister v. Anderson*, 27 La. An. 425. In the District of Columbia a tax-sale does not cut off taxes accruing between the time of the sale and the execution of the deed based thereon: *Wall v. District of Columbia*, 6 Mackey 194. In New Jersey a sale of lands by a town for delinquent taxes assessed against them subsequently to a sale thereof to the town for prior delinquent taxes, divests the town's title under the earlier sale: *Smith v. Specht*, 58 N. J. Eq. 47. In West Virginia, a tax-sale valid to pass the owner's title will prevent forfeiture of it for failure to enter it for taxes in the name of the former owner for years subsequent to the tax-sale: *State v. Sponaule*, 45 W. Va. 415. But if the sale were invalid and the purchaser paid taxes on the land the state would not be prevented on the theory of estoppel from setting up against the purchaser a title to the land by forfeiture for the former owner's failure to enter it for taxation: *Ibid*.

¹ In not a few of the states a tax-sale does not divest existing tax-claims or liens; taxes not included in the sale are not cut off; and successive tax-deeds to different persons

may each be good as against the original owner: See *Reid v. State*, 74 Ind. 252; *State v. Jones*, 95 Ind. 175; *McCollum v. Uhl*, 128 Ind. 304; *Douglas v. Nuzum*, 16 Kan. 515; *Fishel v. Stark*, 49 La. An. 855; *West v. Negrotto*, 52 La. An. 381; *State v. Werner*, 10 Mo. App. 41; *Adams v. Osgood*, 42 Neb. 450; *Medland v. Connell*, 57 Neb. 10; *Rochford v. Fleming*, 10 S. D. 24; *Nashville v. Cowan*, 10 Lea 209. It was held in *Cowell v. Washburn*, 22 Cal. 519, that a sale for a city tax of one year would not cut off the tax for the preceding year. And a sale for a state tax will not in Louisiana divest a lien for a city tax unless the sale realizes enough to pay both: *Belloq v. New Orleans*, 31 La. An. 471. See to the same effect, *Dennison v. Keokuk*, 45 Iowa 266.

² *McDonald v. Hannah*, 51 Fed. Rep. 73, 59 Fed. Rep. 977; *Kile v. Fleming*, 78 Ga. 1; *Gross v. Taylor*, 81 Ga. 86; *Blackwell v. Pidcock*, 43 N. J. L. 165; *Morrow v. Dows*, 28 N. J. Eq. 459; *Gates v. Lawson*, 32 Grat. 12. In Tennessee, a purchaser of land at a tax-sale acquires only the interest of the owner of the land in whose name the land was or should have been assessed, subject to other then existing liens for taxes previously assessed: *Nashville v. Cowan*, 10 Lea 209. And in that state a sale of land for unpaid taxes during the possession of a tenant for life reaches only the life-estate: *Stowell v. Austin*, 16 Lea 700; *Ferguson v. Quinn*, 97 Tenn. 46. In West Virginia the state sells only such title as the taxed party has, and there is no warranty: *State v. Sponaule*, 45 W. Va. 415. In that state the purchaser at a tax-sale be-

the sale.¹ Where the distinct interests of different owners are assessed separately, a sale of the land for a tax against one does not cut off the interests of others.² Title to the land of an infant may be passed by the sale.³ Statutes sometimes provide for selling a leasehold interest in lands; the person taking them who will pay taxes and charges for the shortest term of years.⁴ And it is said to be a matter of legislative discretion whether a purchaser at a tax-sale shall have an absolute title or a life-estate.⁵

Who may acquire tax titles. Some persons, from their relation to the land or to the tax, are precluded from becoming purchasers on grounds which are apparent when their relation to the tax and to the property is shown. The title to be given on a tax sale is a title based on the default of a person who owes to the public the duty to pay the tax, and the sale is made by way of enforcing that duty.⁶ But one person may owe the duty to the public, and another may owe it to the owner of the land by reason of contract or other relations. Such a case may

comes vested with the estate to the lands so purchased as of the time when the estate was vested in the person assessed for the taxes: *McGhee v. Sampselle*, 48 W. Va. —.

¹ *Evans v. Robberson*, 92 Mo. 192; *Powell v. Greenstreet*, 95 Mo. 13; *Graves v. Ewart*, 99 Mo. 13; *State v. Snyder*, 139 Mo. 549. Where the judgment defendant in a suit for unpaid taxes was only entitled to a deed of the premises on payment of the purchase-money, this was all that passed to a purchaser at the sale under the judgment: *Jasper County v. Wadlow*, 82 Mo. 172. The holder of a tax-deed has a paramount title, and has the right of possession against the *cestui que trust* in a trust deed until the latter redeems: *Allen v. McCabe*, 93 Mo. 138. And where a tax-sale purchaser foreclosed his lien making the life-tenant sole defendant, and the land was sold under the decree for the full amount of the lien, nothing but the life-tenant's interest

passed by the sale, and the lien on the remainder-man's interest was thereby extinguished: *Williams v. Hedrick*, 96 Fed. Rep. 657, 37 C. C. A. 552. Land mortgaged to the state for taxes may, under a proper statute, be sold for taxes subject to the lien, but cutting off the mortgager's title: *Harrison v. Williams*, 39 Ark. 315. See *Stockwell v. State*, 101 Ind. 1.

² *Irwin v. Bank of United States*, 1 Pa. St. 349. See *Ex parte Macay*, 84 N. C. 63.

³ *Douglass v. Dickson*, 31 Kan. 310. See *Dawson v. Dawson*, 106 Ga. 45.

⁴ See *Murphy v. Campau*, 33 Mich. 71.

⁵ *Terrel v. Wheeler*, 123 N. Y. 76.

⁶ That the person taxed cannot acquire a tax-title based on his default in paying, see *Texarkana Water Co. v. State*, 62 Ark. 188; *McMinn v. Wheelan*, 27 Cal. 300; *Garwood v. Hastings*, 38 Cal. 216. Whether this rule is universal will be considered later.

exist where the land is occupied by a tenant, who, by his lease, has obligated himself to pay taxes. Where this is the relation of the parties to the land, it would cause a shock to the moral sense if the law were to permit this tenant to neglect his duty and then take advantage thereof to cut off his lessor's title by buying in the land at a tax sale.¹ So the mortgager, remaining in possession of the land, owes to the mortgagee a duty to keep down the taxes; and the law would justly be chargeable with connivance at fraud and dishonesty, if a mortgager might be suffered to permit the taxes to become delinquent, and then discharge them by a purchase which would at the same time extinguish his mortgage.² There is a general principle applicable

¹ *Jackson v. King*, 82 Ala. 432; *Winter v. City Council*, 101 Ala. 649; *Petty v. Mays*, 19 Fla. 652; *Busch v. Huston*, 75 Ill. 343; *Bertram v. Cook*, 32 Mich. 518; *Walker v. Harrison*, 75 Miss. 665. The circumstances will sometimes impose this duty without any actual contract: *Williamson v. Russell*, 18 W. Va. 613. In Kansas it seems a tenant not bound to pay the taxes may acquire the title by purchase: *Weichselbaum v. Curlett*, 20 Kan. 709; *Uhl v. Small*, 54 Kan. 651; *Smith v. Newman*, 62 Kan. 318. Compare *Keith v. Keith*, 26 Kan. 26, and *Duffit v. Tuhan*, 28 Kan. 292, which, under peculiar facts, hold the tenant not entitled to acquire a tax-title. And it was held in *Walker v. Harrison*, *supra*, that if a tenant comes into possession subsequently to the sale he is not precluded from buying the paramount title from the state. Where a receiver gives leases, the tenants cannot make use of their possession to redeem from a tax-sale, and thus acquire rights in themselves as actual settlers. Buying from the state under such circumstances they are to be deemed trustees for the benefit of the owners of the property in the hands of the court, and should be allowed the amount paid: *Waggener v. McLaughlin*, 33 Ark. 195. If a tenant becomes

a disseizor, and the holder of a tax-title brings ejectment against him, a formal waiver by the landlord of his right to object to the tax-title will not affect the tenant: *Reid v. Crapo*, 133 Mass. 251.

² *Barnard v. Wilson*, 74 Cal. 512; *Jordan v. Sayre*, 29 Fla. 100; *Beltram v. Villeré* (La.), 4 South. Rep. 506; *Montgomery v. Whitfield*, 41 La. An. 649; *Ryan v. McGehee*, 103 N. C. 282, 104 N. C. 176; *Interstate B. & L. Assoc. v. Walters*, 50 S. C. 459. The estoppel extends to the mortgager's wife: *Drew v. Morrill*, 62 N. H. 565; *Interstate B. & L. Assoc. v. Waters*, 50 S. C. 459. And to his tenant: *Dunn v. Snell*, 74 Me. 22. And to his grantee or to the purchaser of the equity of redemption: *Travelers' Ins. Co. v. Patten*, 98 Ind. 209; *Brown v. Avery*, 119 Mich. 384; *Washington L. & S. Co. v. McKenzie*, 64 Minn. 273. And to the purchaser at an execution sale against the mortgager: *Fells v. Barbour*, 58 Mich. 49. And to one who has pledged the mortgage to secure a debt, or who has guaranteed the payment of it: *Manley v. Debenature, etc. Co.* (Kan.), 68 Pac. Rep. 31; *Concordia L. & T. Co. v. Parrotte* (Neb.), 87 N. W. Rep. 348. And one who has obligated himself to a mortgagee to pay the taxes but who fails to do so, by reason of which the

to such cases which may be stated thus: That a purchase made by one whose duty it was to pay the taxes shall operate as payment only; he shall acquire no rights as against a third party, by a neglect of the duty which he owed to such party. This principle is universal, and is so entirely reasonable and just as scarcely to need the support of authority. Show the existence of the duty, and the disqualification is made out in every instance.¹

property is sold for taxes, he becoming the purchaser, takes the same subject to the mortgage or as trustee for the mortgagee: *Kirlicks v. Interstate B. & L. Assoc.*, 113 Fed. Rep. 290. Tax-deeds purchased in pursuance of a fraudulent scheme to divest the lien of a mortgage will be set aside: *Connolly v. Connolly*, 63 Iowa 202.

¹ *Lamborn v. County Courts*, 97 U. S. 181; *Leroy v. Reeves*, 5 Sawy. 102; *Bailey's Adm'r v. Campbell*, 82 Ala. 342, 346; *Kelsey v. Abbott*, 13 Cal. 609; *McMinn v. Whelan*, 27 Cal. 300; *Coffinger v. Rice*, 33 Cal. 408; *Barrett v. Amerein*, 36 Cal. 322; *Garwood v. Hastings*, 38 Cal. 216; *Savings & L. Soc. v. Ordway*, 38 Cal. 679; *Burns v. Lewis*, 86 Ga. 591; *Frye v. Bank of Illinois*, 11 Ill. 367; *Prettyman v. Walston*, 34 Ill. 175; *Higgins v. Crosby*, 40 Ill. 260; *Simons v. Drake*, 179 Ill. 62; *Cooper v. Jackson*, 99 Ind. 566; *Beard v. Allen*, 141 Ind. 243; *Wilson v. Carrico*, 155 Ind. 570; *Dayton v. Rice*, 47 Iowa 429; *Stears v. Hollenback*, 38 Iowa 550; *Emmet County v. Griffin*, 73 Iowa 163; *Manning v. Bonard*, 87 Iowa 648; *Carithers v. Weaver*, 7 Kan. 110; *Krutz v. Fisher*, 8 Kan. 90; *Leppo v. Gilbert*, 26 Kan. 138; *Stewart v. Elliott* (Kan.), 66 Pac. Rep. 986; *Oldhams v. Jones*, 5 B. Monr. 458, 467; *Magner v. Ins. Co.*, 30 La. An. 1357; *Varney v. Stevens*, 22 Me. 331; *Gardiner v. Gerrish*, 23 Me. 46; *Fuller v. Hodgden*, 25 Me. 243; *Mathews v. Light*, 32 Me. 305; *Coombs v. Warren*, 34

Me. 89; *Williams v. Hilton*, 35 Me. 547; *Haskell v. Putnam*, 42 Me. 244; *Taylor v. Snyder*, Wal. Ch. 492; *Lacey v. Davis*, 4 Mich. 140; *Allison v. Armstrong*, 28 Minn. 276; *McLaughlin v. Green*, 48 Miss. 205, 207; *Smith v. Cassidy*, 75 Miss. 916; *North American Trust Co. v. Lanier*, 78 Miss. 418; *Wygant v. Dahl*, 26 Neb. 562; *Concordia L. & T. Co. v. Parrotte* (Neb.), 87 N. W. Rep. 348; *Brown v. Simons*, 44 N. H. 475; *Kezer v. Clifford*, 59 N. H. 208; *Laton v. Balcom*, 64 N. H. 92; *Foley v. Kirk*, 33 N. J. Eq. 170; *Coxe v. Wolcott*, 27 Pa. St. 154; *Coxe v. Gibson*, 27 Pa. St. 160; *Annelly v. De Saussure*, 12 S. C. 488; *Pope v. Wilder*, 41 S. C. 540; *Blake v. Howe*, 1 Aikens 306; *Willard v. Strong*, 14 Vt. 532; *Williamson v. Russell*, 18 W. Va. 613; *State v. Eddy*, 41 W. Va. 95; *Smith v. Lewis*, 20 Wis. 350; *Avery v. Judd*, 21 Wis. 362; *Bassett v. Welch*, 22 Wis. 175; *Phelan v. Boylan*, 25 Wis. 679; *Edgerton v. Schneider*, 26 Wis. 385. The purchaser of the equity of redemption is under the same disability: *Travelers' Ins. Co. v. Patten*, 98 Ind. 209. So is the grantee in a deed obtained by fraudulent representations: *King v. Carmody*, 101 Iowa 682. One who takes title to land subject to the encumbrance of a tax, and subsequently buys the tax-title, acquires no additional title: *Jacks v. Dyer*, 31 Ark. 334. Where an owner of property, knowing that taxes levied upon it are insufficient for purposes of the levy, and less than the law requires,

The cases to which attention is called in the margin, and many others to which they refer, will show the application of the rule under a great variety of circumstances. It has been applied to cases where the default was only in part that of the purchaser; as where he was tenant in common with others,¹ or

permits it to be sold under judgment for such taxes, and buys at the tax-sale to escape paying what is justly due, another tax may be levied upon the land to make up his deficiency: *Shelley v. St. Charles County*, 28 Fed. Rep. 875. That the tax-sale purchaser is the daughter of the taxpayer, and that the latter's husband and trustee made the bids, is not enough to stamp the transaction as fraudulent, or to transfer to the purchaser the burden of showing that the money used in the purchase was hers: *Thorington v. City Council*, 88 Ala. 548. The mere fact that purchasers of property at tax-sale were stockholders in a corporation which then owned the legal title to the property is not sufficient to constitute such purchase a payment of the taxes in favor of a subsequent purchaser of the property at a foreclosure sale: *Jenks v. Brewster*, 96 Fed. Rep. 625.

¹*Baker v. Whiting*, 3 Sumn. 475; *Johns v. Johns*, 93 Ala. 239; *Cocks v. Simmons*, 55 Ark. 104; *Emeric v. Alvarado*, 90 Cal. 444; *Choteau v. Jones*, 11 Ill. 300, 322; *Brown v. Hogle*, 30 Ill. 119; *Chickering v. Faile*, 38 Ill. 342; *Bracken v. Cooper*, 80 Ill. 221; *McChesney v. White*, 140 Ill. 330; *Weare v. Van Meter*, 42 Iowa 128; *Fallan v. Chidester*, 46 Iowa 588; *Shell v. Walker*, 54 Iowa 386; *Conn v. Conn*, 58 Iowa 747; *Soreson v. Davis*, 80 Iowa 405; *Van Ormer v. Harley*, 102 Iowa 150; *Blumenthal v. Culver* (Iowa), 89 N. W. Rep. 1116; *Delashmutt v. Parrent*, 39 Kan. 548; *Page v. Webster*, 8 Mich. 263; *Butler v. Porter*, 13 Mich. 262; *Dubois v. Cam-pau*, 24 Mich. 360; *Richards v. Rich-*

ards, 75 Mich. 408; *Sleight v. Roe*, 125 Mich. 585; *Holterhoff v. Mead*, 36 Minn. 42; *Easton v. Schofield*, 66 Minn. 425; *Harrison v. Harrison*, 56 Miss. 174; *Wise v. Hyatt*, 68 Miss. 714; *Cohea v. Hemingway*, 71 Miss. 22; *Clark v. Rainey*, 72 Miss. 151; *Falkner v. Thurmond* (Miss.), 23 South. Rep. 584; *Barker v. Jones*, 62 N. H. 497; *Piatt v. St. Clair's Heirs*, 6 Ohio 227; *Minter v. Durham*, 13 Or. 470; *Lloyd v. Lynch*, 28 Pa. St. 419; *Maul v. Ryder*, 51 Pa. St. 377; *Davis v. King*, 87 Pa. St. 261; *Hall v. Westcott*, 15 R. I. 373; *Downer's Adm'r v. Smith*, 38 Vt. 464; *State v. Williston*, 20 Wis. 240; *Phelan v. Boylan*, 25 Wis. 676; *Hannig v. Mueller*, 82 Wis. 235. Payment by one tenant in common simply inures to the benefit of all: *Donnor v. Quartermas*, 90 Ala. 164; *Chickering v. Faile*, 38 Ill. 342; *McConnell v. Konepel*, 46 Ill. 519; *Goralski v. Kostuski*, 179 Ill. 177; *Oliver v. Montgomery*, 42 Iowa 36; *Field v. Farmers'*, etc. Bank (Ky.), 61 S. W. Rep. 258; *Winter v. Atkinson*, 28 La. An. 650; *Richards v. Richards*, 75 Mich. 408; *Carson v. Broady*, 56 Neb. 648; *Barker v. Jones*, 62 N. H. 497; *Gage v. Gage*, 66 N. H. 282; *Clark v. Lindsey*, 47 Ohio St. 437; *Johnson v. Brauch*, 9 S. D. 116; *Cecil v. Clark*, 44 W. Va. 659. And he will simply hold for reimbursement or equitable contribution, to which, indeed, he will be entitled: *Cocks v. Simmons*, 55 Ark. 104; *Allen v. Poole*, 54 Miss. 324; *Carson v. Broady*, 56 Neb. 648; *Barker v. Jones*, 62 N. H. 497; *Clark v. Lindsey*, 47 Ohio St. 437. A mortgagee of a co-owner of land assessed as one parcel cannot by buying at a tax-sale acquire title as against the other

where his own land was taxed as one parcel with that of another, and the whole was sold together;¹ to the owner of a life-estate in the land, who should have paid the tax for the protection of the inheritance;² to one who was receiving the rents and

co-owner: *Cone v. Wood*, 108 Iowa 260. Nor can a trustee holding the legal title to an undivided half of a tract of land acquire a tax-title adversely to the co-tenants of his *cestuis que trustent*: *Soreson v. Davis*, 83 Iowa 405. Remote purchaser of tax-title acquired by such trustee held chargeable with notice: *Ibid.* The husband or wife of a tenant in common is precluded from buying where the latter is: *Thorington v. City Council*, 94 Ala. 266; *Burns v. Bryne*, 45 Iowa 285; *Blumenthal v. Culver* (Iowa), 89 N. W. Rep. 1116; *Warner v. Broquet*, 54 Kan. 649; *Richards v. Richards*, 75 Mich. 408; *Ward v. Nestell*, 113 Mich. 185; *Robinson v. Lewis*, 68 Miss. 69; *Laton v. Balcom*, 64 N. H. 92. But the husband or wife may purchase land sold or forfeited to the state for taxes, after the interest of the tenant in common has been extinguished: *Murray v. United States*, 29 Ct. Cl. 366; *Boykin v. Jones*, 67 Ark. 571; *Whitehead v. Curry*, 67 Miss. 637. As to the right of one tenant in common to buy in a matured tax-title, see *Kirkpatrick v. Mathiot*, 4 W. & S. 251; *Reinboth v. Zerbe Run Co.*, 29 Pa. St. 139; *Frentz v. Klotsch*, 28 Wis. 312. If a tenant in common is not under obligation to pay the taxes on his co-tenant's interest, he may buy it in for his own benefit at a tax-sale: *Bennet v. North Colorado Springs L. etc. Co.*, 23 Colo. 470. As to what right one might have to buy his co-tenant's interest after paying his own tax, see *Butler v. Porter*, 13 Mich. 262. After his interest has been conveyed, and after he has ceased to be connected with the title, a tenant in common of land which has been sold for taxes may purchase

the tax-title and set it up as against those who were his co-tenants: *Jonas v. Flanniken*, 69 Miss. 577. When the tenure in common has been dissolved by a third person's obtaining paramount title, each co-tenant may buy of him, unless by reason of being in possession when the paramount title was obtained he is precluded: *Alexander v. Sully*, 50 Iowa 192. One who has acquired an undivided interest under a quitclaim deed purporting to convey the whole is not precluded from buying a tax-title originating in his grantor's default, and which, when he took possession, was held adversely to the whole original title: *Sands v. Davis*, 40 Mich. 14. Where a tenant in common with his own money purchases his co-tenant's interest at a tax-sale, such sale being, however, irregular and invalid, and vesting him with a lien only upon the property which by lapse of time may ripen into a title, but before that occurs he receives rents sufficient to reimburse him, he must apply the rents in that way, and not permit the statute to run: *Davis v. Chapman*, 24 Fed. Rep. 674.

¹ *Lewis v. Ward*, 99 Ill. 525; *Cooley v. Waterman*, 16 Mich. 366; *Ragsdale v. Alabama G. S. R. Co.*, 67 Miss. 106; *Griffith v. Silver*, 125 N. C. 368; *Town v. Salentine*, 92 Wis. 404.

² *Hanna v. Palmer*, 194 Ill. 41; *Olleman v. Kelgore*, 52 Iowa 38; *Menger v. Carruthers*, 57 Kan. 425; *Watkins v. Green*, 101 Mich. 493; *Defreese v. Lake*, 109 Mich. 415; *Jones v. Merrill*, 69 Mich. 747. But a devisee of a life-estate who has renounced the devise may purchase and thus cut off the remainderman: *Defreese v. Lake*, *supra*. Where the

profits, and who should have kept down the taxes;¹ to one in possession under a contract whereby he has undertaken to pay the taxes;² to one who, being a judgment creditor and holder of a trust-deed of the debtor's land as security, charged on his books against the debtor the amount of the taxes;³ to an agent employed to pay taxes, who made a purchase of his principal's lands, assuming to justify himself on the ground that his principal had neglected to supply him with the means of making payment.⁴ In all such cases, and all to which the like reasons

grantee in a tax-deed takes a warranty deed from the life-tenant of the property, such deed operates as a redemption from the tax-sale, since it conveys to him simply the life-estate and obligates him to pay the taxes: *Little v. Edwards*, 84 Wis. 649.

¹ *Hunt v. Gaines*, 33 Ark. 267.

² *Fitzgerald v. Spain*, 30 Ark. 95; *Stinson v. Richardson*, 48 Iowa 541; *Cowdry v. Cuthbert*, 71 Iowa 733; *Pringle v. Wagnoer*, 110 Mich. 612; *Harkreader v. Clayton*, 56 Miss. 383. A vendee in possession under a land contract requiring her to pay taxes is estopped from asserting that a third person has acquired title through her default in paying taxes; and such estoppel applies to her husband where his possession is in her right and where she never has yielded to him her right of possession: *Hubbard v. Shepard*, 117 Mich. 25. Tax-title acquired by purchaser of legal title to land held void as against equitable owner: *Hoge v. Hubb*, 94 Mo. 489. A vendee in possession under a contract for cutting timber, the title to which was to be in the vendor until paid for, cannot avoid payment by buying the land at a tax-sale: *Lacy v. Johnson*, 58 Wis. 414, citing Wisconsin cases. Purchase by wife at tax-sale of land in husband's possession under agreement to pay taxes: *Willard v. Ames*, 130 Ind. 351.

³ *Faison v. Johnson*, 70 Miss. 214.

The holders of judgment liens have been held entitled to buy and hold the title as well against the debtor as against other creditors: *Morrison v. Bank of Commerce*, 81 Ind. 335. Whether a creditor secured by a deed of trust can purchase a tax-title and set it up against the grantor, *quære*; but he cannot buy for their mutual benefit, and then use the title acquired to defeat the equity of redemption: *Martin v. Swofford*, 59 Miss. 328.

⁴ *McMahan v. McGraw*, 26 Wis. 614. As to the disqualification of the agent to purchase his principal's land at the tax-sale, see, further, *Schedda v. Sawyer*, 4 McLean 181; *Kelsey v. Abbott*, 13 Cal. 609; *Bernal v. Lynch*, 36 Cal. 135, 146; *Shay v. McNamara*, 54 Cal. 169; *Gamble v. Hamilton*, 31 Fla. 401; *Barton v. Moss*, 32 Ill. 50; *Eckrote v. Myers*, 41 Iowa 324; *Bowman v. Officer*, 53 Iowa 640; *Young v. Goodhue*, 106 Iowa 447; *Krutz v. Fisher*, 8 Kan. 90; *Oldhams v. Jones*, 5 B. Monr. 458; *Matthews v. Light*, 32 Me. 305; *Lindsey v. Sinclair*, 24 Mich. 380; *Tapp v. Bonds*, 51 Miss. 281; *Bartholemew v. Leach*, 7 Watts 472; *Knupp v. Symms*, 200 Pa. St. 489; *Curtis v. Borland*, 35 W. Va. 124. The mere fact that one had been an attorney for the owner would not preclude his buying: *Pack v. Crawford*, 29 Ark. 489. It is otherwise if he is counsel in a matter relating to the title: *Wright v. Walker*, 30 Ark. 44. See *Eckrote v. Myers*, 41 Iowa 324;

apply, the purchase, as between the parties, is in law a payment only; or if made at second hand from another who was purchaser at the public sale, it is allowed to operate, for the purposes of justice, only as a redemption,¹ and the party making it may have a remedy over for the money paid, or for any portion thereof, if in equity any other person who is benefited by the purchase ought to have paid it; otherwise not.²

Connecticut Mut. L. Ins. Co. v. Bulte, 45 Mich. 113. One's having been the mortgager's attorney in proceedings to foreclose held not to make him the agent of the mortgager so as to defeat his title as purchaser of the mortgaged land at a public sale thereof made pending the foreclosure for taxes assessed against the mortgager: Wilson v. Cantrell, 40 S. C. 114. A purchase at a tax-sale by the attorney of a mortgagee in foreclosure, and a conveyance afterwards of his interest by quitclaim deed were held to amount to redemption from sale in favor of his client: Boardman v. Boozewinkel, 121 Mich. 320. An agent's purchase is only avoidable at the option of the principal, who, if he avoids it, must refund what was paid: Ellsworth v. Cordrey, 63 Iowa 675; Connecticut Mut. L. Ins. Co. v. Bulte, 45 Mich. 113. Where an agent charged with the duty of paying taxes on land purchases it at a tax-sale, and conveys to an insolvent grantee for value, the latter will be protected against the equities of the former owner: Lamb v. Davis, 74 Iowa 719.

¹ See Jackson v. King, 82 Ala. 432; Bernal v. Lynch, 36 Cal. 135, 146; Blumenthal v. Culver (Iowa), 89 N. W. Rep. 1116; Carithers v. Weaver, 7 Kan. 110; Delashmutt v. Parrent, 39 Kan. 548; Stewart v. Elliott (Kan.), 66 Pac. Rep. 986; Montgomery v. Whitfield, 41 La. An. 649; Sleight v. Roe (Mich.), 85 N. W. Rep. 10; Easton v. Schofield, 66 Minn. 425; Falkner v. Thurmond (Miss.), 23

South. Rep. 584; King v. Cassidy, 75 Miss. 916; Coxe v. Wolcott, 27 Pa. St. 154; Knupp v. Syms, 200 Pa. St. 489; State v. Eddy, 41 W. Va. 95; Shepardson v. Elmore, 19 Wis. 424; Hannig v. Mueller, 82 Wis. 235; Little v. Edwards, 84 Wis. 649. Where one purchases not for himself, but for a company of which he is a member, to protect it on its guaranty of the collection of a mortgage on the land, such purchase is merely a redemption from the tax-sale, and judgments against the mortgager, rendered after the tax-sale and before the issue of the tax-deed, are prior liens: Beacham v. Gurney, 91 Iowa 621. Where one accepts a warranty deed of land to secure a debt due him from the owner, records the deed, takes possession of the premises, and publicly claims to be the owner thereof, any purchase by him of the premises at a tax-sale, while in such possession, may justly be considered by all persons interested in the payment of the taxes, other than the owner thereof, as a redemption of the premises from taxes: Miller v. Ziegler, 31 Kan. 417. If a mortgagee's solicitor in foreclosure buys, the purchase amounts to a redemption from the sale, and cannot be considered as an independent title: Boardman v. Boozewinkel, 121 Mich. 320.

² See Donnor v. Quartermas, 90 Ala. 164; Hunt v. Gaines, 23 Ark. 267; Cocks v. Simmons, 55 Ark. 104; Goralski v. Kostuski, 179 Ill. 177; King v. Carmody, 101 Iowa 682; Lang-

Some other cases are not so plain, because the duty as between the parties is not so definitely determined by their contract or by their legal relation. While a mortgager in general cannot be allowed to cut off his mortgage, by buying in the land at tax-sale,¹ yet if the mortgagee were in possession, receiving the issues and profits, and bound to pay the taxes himself, it might not be so clear that the mortgager should be precluded from taking advantage of the mortgagee's neglect. If it were to be so held, there would seem to be reason for holding that the mortgagee also, by reason of his relation to the title, was precluded from becoming purchaser of the mortgager's interest at a tax-sale, and that his remedy would be confined to a payment for the protection of his lien, with a remedy over for the amount paid. It cannot be said in such a case that either mortgager or mortgagee is under no obligation to the government to pay the tax. On the contrary, the tax being one that purposely is made to override the lien of the one as well as the title of the other, it might well, as it seems to us, be held that neither mortgager nor mortgagee was at liberty to neglect the payment, as one step in bettering his condition at the expense of the other, but that the presumption of law should be that the party purchasing did so for the protection of his own interest merely. And so, in general, are the authorities.² The sale in such a case, however, would not be absolutely

ley v. Chapin, 134 Mass. 82; Connecticut Mut. L. Ins. Co. v. Bulte, 45 Mich. 113; Martin v. Swofford, 59 Miss. 328; Carson v. Broady, 56 Neb. 648; Barker v. Jones, 62 N. H. 497; Clark v. Lindsey, 47 Ohio 437.

¹See *ante*, p. 964.

²See *Middletown Bank v. Bacharach*, 46 Conn. 513; *Chickering v. Failes*, 26 Ill. 507; *Moore v. Titman*, 44 Ill. 367; *Stinson v. Connecticut Mut. L. Ins. Co.*, 174 Ill. 125; *Ragor v. Lomax*, 22 Ill. App. 628; *Schenck v. Kelley*, 88 Ind. 444; *Maxfield v. Willey*, 46 Mich. 252; *Martin v. Swofford*, 59 Miss. 328; *Brown v. Simons*, 44 N. H. 475; *Hall v. Westcott*, 15 R. I. 373, 17 R. I. 304; *Beckwith v. Seborn*, 31 W. Va. 1; *Fisk v. Bru-*

nette, 30 Wis. 102. Compare *Walthall v. Rives*, 34 Ala. 91; *Harrison v. Roberts*, 6 Fla. 711; *Norton v. Metropolitan L. Ins. Co.*, 74 Minn. 484; *Williams v. Townsend*, 31 N. Y. 411; *Chapman v. Mull*, 7 Ired. Eq. 292; *Sturdevant v. Mather*, 20 Wis. 576. In *Hawes v. Howland*, 136 Mass. 267, it was held that one who buys at a tax-sale while a suit is pending to restore the lien of a mortgage will take his title subject to the result of the suit whether he knew of its pendency or not. One who has given a bond to indemnify the mortgagee against a tax-title cannot buy it in and set it up against the rights of the mortgagee acquired by foreclosure: *Wyman v. Baer*, 46 Mich.

void, but only voidable at the option of the party who would be injured by it, and only to the extent necessary for his protection.¹ A first mortgagee, it has been held, owes no duty to other lien-holders, and may cut off a second mortgage by a tax-purchase.² It has also been held that a junior mortgagee can-

418. Where a mortgagee forecloses on land upon which there are taxes due, but against which there are as yet no deeds, he may pay the taxes and have the amount included in his judgment, or after confirmation of sale have the sheriff directed to satisfy all tax-liens from the proceeds of the sale; but if he delays confirming sale until deeds have issued for the taxes, he cannot contest them on the ground that when the deeds issued the land did not belong to the mortgager, and could not be sold as his: *Galbreath v. Drought*, 29 Kan. 71. A mortgagee is not precluded from cutting off one tax-title by buying at a second sale: *Spratt v. Price*, 18 Fla. 289. Nor from acting as agent of another in a tax-purchase: *Jury v. Day*, 54 Iowa 573. A subsequent purchaser under a prior mortgage cannot in ejectment contest the validity of the purchase of a lot by a city under the foreclosure of an assessment lien: *Krutz v. Gardner*, 18 Wash. 332. In an action to set aside a mortgage as in fraud of creditors the mortgagee may set up an independent tax-title acquired before possession was taken under the mortgage, or any duty to pay the taxes arose: *Allen v. Dayton Hotel Co.*, 95 Tenn. 480. In Kansas one who stands in the mere relation of mortgagee is not precluded from acquiring a tax-title based on a sale made before he went into possession: *McLaughlin v. Acom*, 58 Kan. 514. See *Waterson v. Devoe*, 18 Kan. 223. In Minnesota a mortgagee may acquire against the mortgager a tax-title to the mortgaged premises, where he is neither legally nor equi-

tably bound to protect the property against the taxes for which the sale is made; a mortgagee not being among the persons forbidden by the statute to acquire tax-titles: *Reimer v. Newell*, 47 Minn. 237. A mortgagee who buys at a tax-sale may add the amount with interest to his mortgage on foreclosure: *Baker v. Clark*, 52 Mich. 22; *Young v. Brand*, 15 Neb. 601. But if he forecloses first and then buys, he takes the risks of a purchase, and cannot afterwards foreclose again in respect of his tax purchase: *Walton v. Hollywood*, 47 Mich. 385. A mortgagee who has become absolute owner by foreclosure, and then buys at a tax-sale, only in legal effect pays the tax, and has no remedy if the tax is bad: *Home Sav. Bank v. Boston*, 131 Mass. 277. Where a city buys at tax-sale and puts the mortgager in possession as tenant at will, the mortgagee cannot enter for breach of condition, since if the mortgager were ousted the city would be entitled to possession: *Coughlin v. Gray*, 131 Mass. 56.

¹That the municipality cannot question the tax-title in such a case, see *Home Sav. Bank v. Boston*, 131 Mass. 277. It was held in *Maxfield v. Willey*, 46 Mich. 252, that either the mortgager or mortgagee may bid as a stranger to the title if the other does not object.

²*Connecticut Mut. L. Ins. Co. v. Bulte*, 45 Mich. 113. But the utmost that the second mortgagee can claim if the first mortgagee does not hold the title is that the purchase inured as a payment of the tax; and if he redeems from the first mortgage he must pay this as a part of the first

not cut off the first mortgage by acquiring a tax-title, or exact penalties if the first mortgagee offers to reimburse him for his payment.¹ In Connecticut the general rule is laid down that one who has a right to redeem from a mortgage, and who, on redeeming, would be required to refund to the mortgagee any taxes paid by him, cannot be a purchaser of the property if it is sold for taxes.² A mortgagee of land subject to a rent charge cannot cut off that charge by procuring a tax-title of the land.³ And where the statute provides that if a mortgagee pays taxes the amount shall become part of the amount due on the mortgage, the mortgagee cannot, by acquiring a tax-title, cut off a right of dower.⁴

It has been very properly held that one who has conveyed lands with warranty cannot, as against his grantee, acquire a tax-title for taxes, any part of which were on the land when his conveyance was given.⁵ So he who, pending an injunction sued out by himself to restrain the enforcement of a mechanic's lien, obtains a tax-title, will not be allowed to make use of

mortgagee's lien: *Ibid.* See, also, *Maxfield v. Willey*, 46 Mich. 252; *Newton v. Marshall*, 62 Wis. 8. It was held in *Norton v. Metropolitan L. Ins. Co.*, 74 Minn. 484, that as between the first mortgagee and the second it is the duty of each to pay the taxes, and one cannot acquire a tax-title to the mortgaged premises as against the other; and if the second mortgagee pays taxes, he is entitled to reimbursement when his rights are cut off by the expiration of the right to redeem from a foreclosure of the first mortgage. In *Deveraux v. Taft*, 20 S. C. 555, it was decided that if a mortgagee of land which is subject to a mechanic's lien junior to the mortgage buys at a tax-sale, his mortgage will be merged in the fee, the mortgage debt extinguished, and the tax-title subject to the mechanic's lien. A tax-title acquired by the purchaser at a foreclosure sale is not paramount to the junior mortgagee's title when the taxes were paid out

of the proceeds of the land and not by the purchaser: *Morss v. Burns*, 63 Hun 628.

¹ *Garrettson v. Scofield*, 44 Iowa 35; *Frank v. Arnold*, 73 Iowa 370; *Woodbury v. Swan*, 59 N. H. 22. See *Strong v. Burdick*, 52 Iowa 630. The above rule held applicable to the case of a judgment lien which was subject to a mortgage: *Fair v. Brown*, 40 Iowa 209.

² This rule applied to one who had acquired one-eighth of the equity of redemption: *Middletown Bank v. Bacharach*, 46 Conn. 513; and to a second mortgagee in possession: *Goodrich v. Kimberly*, 48 Conn. 395.

³ *Homer v. Dellinger*, 18 Fed. Rep. 495.

⁴ *Walsh v. Wilson*, 130 Mass. 124.

⁵ *Hannah v. Collins*, 94 Ind. 201; *Frank v. Caruthers*, 108 Mo. 569. See *Gates v. Lindley*, 104 Cal. 451. In *Rapp v. Lowry*, 30 La. An. 1272, the same ruling was had where the conveyance was without warranty.

it to defeat the lien.¹ So a guardian cannot destroy the estate of his wards by purchasing a tax-title adverse to them.² So a tax-title to land acquired by one who holds the legal title to the land in trust to secure the legal payment of a debt is also held in trust.³ So a beneficiary under a trust deed cannot acquire a tax-title adverse to the trust.⁴ And any purchase by one who, by contract or otherwise, was under obligation to pay the taxes, will be deemed a payment only.⁵ But one who has been in possession under a contract of purchase which he has surrendered is not precluded from buying.⁶

Whether one should be precluded by the naked fact that he claims title to the land, or that he has possession of it, from making a purchase in extinguishment of the right of another with whom he stands in no contract or fiduciary relations, is a question often touched by the discussion of courts without having as yet been very fully or comprehensively examined. So far as the cases hold that one who ought, as between himself and some third person, to pay the taxes, shall not build up a title on his own default, the principle is clear and well-founded in equity. But when one owes no duty to any other in respect to the land, it is not so clear upon what principle of equity or of estoppel such other is to set up, as against him, his neglect to perform in due season his duty to the state.

There are some cases in which it has been distinctly held that possession, when the tax was assessed, fixed upon the possessor the duty to pay, and precluded his becoming a purchaser at a sale for the taxes when they became delinquent. In the leading case the occupant had gone into possession under an invalid tax-title, and by the decision he was precluded from relying upon a second title which accrued while he was in the

¹ *McLaughlin v. Green*, 48 Miss. 175.

² *Dohms v. Mann*, 76 Iowa 723;
Wise v. Hyatt, 68 Miss. 714.

³ *Ward v. Matthews*, 80 Cal. 343.
But where the debtor was in possession, claiming ownership, when the tax-assessment was made, and failed to pay the taxes, he can only demand a conveyance of the trustee's interest on payment of the amount

of the debt, taxes, costs, and interest:
Ibid.

⁴ *Frierson v. Branch*, 30 Ark. 453.
The wife of the grantor in a trust-deed is not precluded from buying, and she may hold the tax-title against a creditor who has foreclosed: *Carter v. Bustamente*, 59 Miss. 559.

⁵ See *ante*, p. 968.

⁶ *Shoup v. Central, etc. R. Co.*, 24 Kan. 547.

occupancy of the land.¹ The subject is dismissed with very brief mention, the court appearing to regard the claim as inequitable and unjust, but for what reason is not very clearly explained. Other cases treat the point as equally plain.² But it seems to be very well deserving of more consideration whether, where parties stand to each other in the position of adverse claimants to land, either of them can insist that the other shall discharge for his protection a duty owing to the public. There being nothing in the relation of the parties to each other upon which an estoppel can be raised, it is necessary to look elsewhere for the disqualification insisted upon; and this can only be found in some general rule of public policy. It is certainly an imperative requirement of public policy that the revenues of the state shall be collected, and that no one shall be allowed to defraud the treasury of his due proportion; but in the case where a tax sale has been made there is no fraud, and the revenue chargeable upon the land has been

¹ *Douglas v. Dangerfield*, 10 Ohio 152.

² *Choteau v. Jones*, 11 Ill. 300, 322; *Lacey v. Davis*, 4 Mich. 140, 152. The doctrine of *Choteau v. Jones*, *supra*, was affirmed in *Voris v. Thomas*, 13 Ill. 442, and the same general doctrine is asserted in *Smith v. Lewis*, 20 Wis. 350, 354, though there the case was between the mortgagee and the assignee of the mortgage, and the relation of the parties precluded a purchase. The same remark may be made of *Dubois v. Campau*, 24 Mich. 360. *Bassett v. Welch*, 22 Wis. 175, goes the full length of deciding that the mere fact of possession when the taxes are assessed is a disqualification to buy. *Jones v. Davis*, 24 Wis. 229, was a case where one in possession of land had endeavored to cut off a judgment lien by a purchase at tax-sale, corresponding to the case of purchase by a mortgager. *Whitney v. Gunderson*, 31 Wis. 359, 379, asserts the broad doctrine that if one was in possession when the tax was assessed, "it then became

his duty to pay the taxes, and he could not permit the lands to be sold for such taxes, and obtain a tax-deed for the purpose of destroying an outstanding title." And see *McMinn v. Whelan*, 27 Cal. 300; *Barrett v. Amerein*, 36 Cal. 322; *Christy v. Fisher*, 58 Cal. 256; *Guyun v. McCauley*, 32 Ark. 97; *Blakely v. Bestor*, 13 Ill. 708; *Keith v. Keith*, 26 Kan. 26. In *Swift v. Agnes*, 33 Wis. 228, it is decided that where one owning land, and bound to pay taxes thereon, permits them to be sold and deeded for such taxes, and then purchases the tax-title, and causes it to be conveyed to a third person for his benefit, he cannot set up such title as a defense in ejectment against one who has purchased at a sale on execution against him since the execution of the tax-deed. There is nothing in the fact that the owner of the land has become the purchaser at tax-sale which can estop him from claiming the surplus moneys: *Russel v. Reed*, 27 Pa. St. 166.

received. No wrong has consequently been done to the state. There has been delay in payment, but it is one for which the state makes ample provision, and for which it charges and collects all costs, as well as a further sum under the name of interest or penalty sufficient fully to compensate for any public inconvenience. It is not perceived that the state can then have any complaint to make, as the duty owing to it, though performed tardily, has been performed at last, and the incidental inconvenience paid for. The state, then, not being wronged in the purchase, it would seem that if any individual objects to it he ought to be able to point out how and in what particular it wrongs him.

It is difficult to dispute the truth of what is said by the supreme court of Pennsylvania, that "there is nothing in reason or law to prevent a man who holds a defective title from purchasing a better at a treasurer's sale for taxes."¹ As between

¹ *Woodward, J.*, in *Coxe v. Gibson*, 27 Pa. St. 160, 165. And see *Blackwood v. Van Vleet*, 30 Mich. 118; *Lybrand v. Haney*, 31 Wis. 230. In *Tweed v. Metcalf*, 4 Mich. 579, it was decided that one who had bought at a tax-sale might buy the same land at a subsequent sale made at any time before redemption from the first had expired. In *Eaton v. North*, 29 Wis. 75, it was held that one having a tax-title, but not in possession, might buy at a subsequent sale. In *Stubblefield v. Borders*, 92 Ill. 279, it is said that, where no duty appears to rest on one who claims title to land to pay old taxes assessed upon it, his purchase of an outstanding title for such taxes will not be held a payment, but a purchase. In *Paul v. Fries*, 18 Fla. 573, it is held that if one who has an apparently valid tax-title buys again, his purchase is only payment. Where land in its owner's possession is sold for taxes assessed in the names of persons out of possession, but claiming under tax-deeds void on their face, nothing in the relation of the parties estops such persons from claiming under a tax-deed given to them as purchasers at such tax-sale: *Staley v. Leamans*, 53 Ark. 428. A purchaser of land at an execution sale which has been set aside by the court which issued the execution has not an interest in the land that will preclude him from purchasing it at tax-sale: *Thayer v. Hartman*, 78 Miss. 590. One who is not in possession, and whose only claim is under a void tax-deed, is not precluded from buying: *Neal v. Frazier*, 63 Iowa 451. The fact that one at the time taxes accrued held the legal title to the land, which title was afterwards set aside for fraud on his grantor's part, does not prevent him from purchasing the title afterwards, and setting it up against the legal title: *Seymour v. Harrison*, 85 Iowa 180. The fact that one allowed his patent title to land to be extinguished by adverse possession does not preclude him from purchasing a tax-title thereto which accrued during such possession and from setting it up against such adverse claimant: *Ard v. Pratt*, 53 Kan. 632. An assignee for the benefit of creditors held not

himself and any adverse claimant, the state is not concerned to inquire whether the one or the other was in possession. If the state, in taxing land, takes any notice of ownership, it is either for the convenience of the officers in making collections or for information to parties concerned. The tax is upon every possible interest in the land; and all parties having interests are equally under obligation to the state to make payment. The penalty for failure is a forfeiture or sale which will cut them all off; and while, without doubt, any one may defeat such a sale who can give satisfactory reasons for an assertion that it would be unjust to him for the purchaser to be allowed to rely upon it, it is not perceived that any other person can, upon plausible grounds of equity, insist upon the privilege to do so.¹ There are decisions that the possession of a mere intruder or trespasser will not preclude his becoming purchaser:² if this is

precluded from purchasing: *Lamb v. Davis*, 74 Iowa 719. So with the owner of unseated lands: *Neill v. Lacy*, 110 Pa. St. 294. Where a tax on unseated land (creating no liability against the owner) had become a lien on the land before the severance of the title to the minerals from that to the surface, the purchaser of the title to the surface, as against a purchaser of the titles to the minerals, may acquire the title to the land at the tax-sale: *Powell v. Lantzy*, 173 Pa. St. 543. A claim of title under a tax-sale is inconsistent with a claim of title antecedent to it: *Branham v. Bezanson*, 33 Minn. 49.

¹ It is said in California that one in possession of lands, if under no legal or moral obligation to pay the tax, may buy in the lands at tax-sale: *Moss v. Shear*, 25 Cal. 38. The same ruling is made in Kansas: *Bowman v. Cockrill*, 6 Kan. 311, 332. And see *Allen v. Russell*, 59 Ohio St. 137. "To preclude any person from making and relying upon a purchase of lands at tax-sale, there must be something in the circumstances of the case which imposes upon him a duty to the state to pay the tax, or

something which renders it inequitable, as between himself and the holder of the existing title, that he should make the purchase." *Blackwood v. Van Vleit*, 30 Mich. 118; *Atkinson v. Dixon*, 89 Mo. 464. The former case denies that the mere fact that one is in possession of the land when the tax is levied should preclude his becoming a purchaser when the land is not assessed to him, and he is bound by no contract relation to pay the tax. The rule that the owner of land cannot reap any advantage by acquiring a tax-title thereto, under a sale for taxes which he ought to have paid, does not apply to one who purchases the land subject to the levy of the tax, and who is under no legal or moral duty to pay it: *Oswald v. Wolf*, 129 Ill. 200. A father is not precluded by his relationship from acquiring a valid title at a tax-sale of his son's land: *Langley v. Batchelder*, 69 N. H. 566.

² *Buckley v. Taggart*, 62 Ind. 236; *Link v. Doerfer*, 42 Wis. 391. It is said in the latter case that if no title appears the party presumptively is a mere intruder. See *Read v. Crapo*, 133 Mass. 201.

true, mere possession ought not to be an impediment in any case; for the element of wrong involved in the possession of a trespasser cannot, on any grounds of equity or justice, be taken notice of as giving him a privilege denied to one whose possession is rightful.¹

In what is said above it must not be understood that when it is said one may rely upon a tax-title, this means that the title is to be held valid in his favor. In general, if there are fatal irregularities or defects in a tax-title, any one may rely upon them when the tax-title is made use of against him; as they go, or may go, to the power of the officer to sell at all.²

Bids by the state or county. It is not an uncommon provision that, if no bidders offer to take the land and pay the tax, it shall be bid in for the whole county. In the absence of express statutory authority a city or other municipality could not, however, buy land at a tax-sale.³ A purchase on a bid by the

¹ In *Curtis v. Smith*, 42 Iowa 655, it is held that if possession is not held as tenant, trustee, or agent of the owner, it is no impediment to buying a tax-title. Hence one in possession who claims adversely to the owner under a void quitclaim deed may buy. And in *Seaver v. Cobb*, 98 Ill. 200, it is decided that one may buy up a tax-title held by a third person, which accrued while he occupied the land claiming that it belonged to the United States, and may use such title against an adverse claimant.

² "The rights of a purchaser at a tax-sale are fixed at the time of his purchase, and his title depends upon the validity of the proceedings had anterior to his purchase. Nor can his rights be enlarged by any evidence introduced to supply fatal omissions which constitute defects which are fundamental and jurisdictional to the tax:" *Sheets v. Paine* (N. D.), 86 N. W. Rep. 117.

³ *Champaign v. Harmon*, 98 Ill. 471; *Logansport v. Humphrey*, 84 Ind. 467. It was held in *Keller v.*

Wilson, 90 Ky. 350, that a city, having power to purchase property for governmental purposes, can purchase land for non-payment of city taxes. And if a county is authorized by law to bring suit for taxes, it has authority to buy lands on the judgment: *Douthett v. Kettle*, 104 Ill. 356. In Nebraska counties may purchase at a tax-sale when there are no private bidders, and may assign the certificate: *Shelley v. Towle*, 16 Neb. 194; *Otoe County v. Brown*, 16 Neb. 394. Where a city buys land at a tax-sale for a term of 900 years, the charter limiting its right of purchase to a term of fifty years, the sale will be decreed illegal on the condition that the tax, with lawful interest, be paid: *Baldwin v. Elizabeth*, 42 N. J. Eq. 11. It was held in *Heath v. McCrea*, 20 Wash. 342, that the purchase by a city of property at a sale to satisfy an assessment is not prejudicial to the owner. And in *Berry v. Bickford*, 63 N. H. 328, it was decided that a town which becomes purchaser of land sold for taxes is not estopped from setting up its

state or county would give the state or county the usual rights of a purchaser, and no more.¹ Whether a deed would be requisite to carry such a purchase into effect must depend upon the statute.² If by statute land is to be struck off to a county without its bidding in case there are no bidders, a deed to the county which shows a bid for it, and does not show there were no other bidders, is void on its face.³ In general, it may be said that, when land is struck off to the state or any of its municipalities in pursuance of law, no better title passes than would pass on a purchase by an individual; and the title, when brought in contest, must be proved in the usual way unless the statute has made some special rule on the subject.⁴

title by the fact that for two years after sale and before a deed had been given by the collector, the land was taxed to and taxes paid by the owner. Bidding in by a city land which could not be sold for the amount of taxes, etc., was held to constitute "a public sale:" *Bannon v. Burnes*, 39 Fed. Rep. 829.

¹ See *Gendrey v. Broussard*, 32 La. 924. It is held in *Connecticut Mut. L. Ins. Co. v. Wood*, 115 Mich. 444, that a valid tax-sale vests in the purchaser, whether a state or a private person, an absolute title in fee. In Colorado a proper tax-deed to the county conveys as good title as is conveyed by a similar deed to a cash purchaser: *Dyke v. Whyte*, 17 Colo. 296. In Arkansas a sale of land to the state in a suit to foreclose a tax-lien conveys no transferable title until the two years allowed for redemption have expired: *St. Louis Refriger. etc. Co. v. Langley*, 66 Ark. 48. In North Carolina a county purchasing land at a tax-sale acquires no title thereto until foreclosure of the certificate: *Wilcox v. Leach*, 123 N. C. 74; *Felch v. Travis*, 92 Fed. Rep. 210. Commissioners authorized to bid the amount of the tax on behalf of the county may, if they bid more, have the land left on their hands unless the county sees fit to take it. The

bid cuts off the prior title: *Russel v. Reed*, 27 Pa. St. 166. And see *Cuttle v. Brockway*, 32 Pa. St. 45. Commissioners authorized to bid off land for the United States, unless some person will bid two-thirds of the appraised value, are not compelled to do so, and a sale to another bidder for less is not invalid: *Turner v. Smith*, 14 Wall. 553, 562. In Kansas the county treasurer holds a certificate of sale to the county until it can be sold to an individual, and then assigns the certificate. The county commissioners cannot control his action in this regard: *State v. Magill*, 4 Kan. 415.

² Deed held unnecessary in *Arkansas*: *Neal v. Andrews*, 53 Ark. 445; *Doyle v. Martin*, 55 Ark. 37.

³ *Norton v. Friend*, 13 Kan. 532; *Magill v. Martin*, 14 Kan. 67; *Babbitt v. Johnson*, 15 Kan. 252; *Larkin v. Wilson*, 28 Kan. 513.

⁴ As to proving the title of the state in Mississippi, see *Clymer v. Cameron*, 55 Miss. 593; *Vaughan v. Swayzie*, 56 Miss. 704; *Weathersby v. Thomas*, 57 Miss. 296; *French v. Ladd*, 57 Miss. 678; *Mayson v. Banks*, 59 Miss. 447. And a purchase from the state: *Allen v. Poole*, 54 Miss. 323. In North Carolina it is said that a tax-title acquired by a city is a nullity unless the statute is shown to have been

Lands thus bought by the state are not subject to taxation, nor can they be sold again for taxes unless the statute permits.¹ Often, however, provision is made by law for taxing the land while held by the state.² Sometimes a return of the public sale is necessary before the state can dispose of the lands at private sale.³ Where the statute provides for a sale after a specified notice, a private sale without such notice is void; the provision for sale being regarded as a proceeding to collect taxes, which must be followed.⁴ The state being the

complied with strictly: *Busbee v. Lewis*, 85 N. C. 332.

¹ *Joyner v. Harrison*, 56 Ark. 276; *Neal v. Wideman*, 59 Ark. 5; *Muskegon Lumber Co. v. Brown*, 66 Ark. 539; *Bradford v. Walker* (Ky.), 5 S. W. Rep. 555; *Bradford v. Lafargue*, 30 La. An. 432; *Connecticut Mut. L. Ins. Co. v. Wood*, 115 Mich. 444; *Aztec Copper Co. v. Auditor-General* (Mich.), 87 N. W. Rep. 895; *McHarg v. Halden* (Minn.), 86 N. W. Rep. 619; *Louisville, H. O. & T. R. Co. v. Buford*, 73 Miss. 494; *Wells v. Johnston* (N. Y.), 63 N. E. Rep. 1095; *Dooley v. Christian*, 96 Va. 534; *Parsons v. Newman*, 99 Va. 298; *Glenn v. Brown*, 99 Va. 322; *Baker v. Buckner*, 99 Va. 368; *Totten v. Nighland*, 41 W. Va. 800. Where lands have been sold for taxes and bid in by the state, which assigns its interests, it cannot impeach title by resale for taxes due for prior years. If the assignee of the state assignment certificate perfects title thereunder he acquires title free of all prior liens: *State v. Camp*, 79 Minn. 343. It was, however, said in *State v. Kipp*, 80 Minn. 119, that he takes subject to the state's right to enforce a prior tax when refundment has been made on account of a void sale. Though it is provided by statute that lands struck off to a county shall not be resold while the county holds the title, yet if its purchase was void the statute will be held inapplicable, and the county may acquire a subsequent

title while still holding the first deed: *Morrill v. Douglass*, 17 Kan. 291. Tax-purchase by county lost or abandoned where land is assessed for taxes as before and sold for such taxes: *Schreiber v. Moynihan*, 197 Pa. St. 578; *Feltz v. Natalie Anthracite Coal Co. (Pa.)*, 52 Atl. Rep. 82. It was held in *Emmons County v. Bennett*, 9 N. D. 131, that a tax-deed to a subsequent purchaser cuts off a county's rights under a prior sale for delinquent taxes of previous years. And it was decided in *Berglund v. Graves*, 72 Minn. 148, that after the state had bid in land for taxes for one year it is not obliged to obtain a tax-judgment and sell land for the delinquent taxes of each successive year. Where lands bid in by the state for taxes have been unlawfully sold by the county treasurer, the state is not estopped from asserting and proving title to the land against the purchaser at such sale: *Wells v. Johnston* (N. Y.), 63 N. E. Rep. 1095.

² See *Gulf States Land Co. v. Parker*, 60 Fed. Rep. 974; *State v. Recorder*, 45 La. An. 556; *Couch v. Marye* (Va.), 8 S. E. Rep. 582; *Gilbert v. Pier*, 102 Wis. 334.

³ *Johnson v. Finley*, 54 Neb. 733; *Medland v. Connell*, 57 Neb. 10; *Medland v. Linton*, 60 Neb. 249.

⁴ *Jenks v. Wright*, 61 Pa. St. 410. In Louisiana, where property adjudicated to the state for taxes has been sold by it, notice of a subsequent sale for taxes should be given to the pur-

owner it can fix the price and impose upon the purchasers such conditions as it deems proper.¹ An application for purchase should comply substantially with the statute.² Payment at the time of the purchase of all taxes or tax-interests that are liens upon the land may be required.³ It has been held that the purchase from the state becomes complete when application and payment are made, the issue of a certificate, or the execution of a deed, or both, being mere ministerial acts necessary to show title.⁴ One who receives from the state a deed of lands sold to it for delinquent taxes takes the property under the same conditions as the state held it under, and subject to the same equities and defenses.⁵ And as the title of

chaser from the state: *Gowland v. New Orleans*, 52 La. An. 2042. In Virginia an applicant to purchase land bought in by the state for taxes should give notice to the trustee and beneficiary in a deed of trust, even though such deed is not properly indexed: *Virginia B. & L. Co. v. Glenn* (Va.), 39 S. E. Rep. 136. As to when, in Michigan, lands bid off to the state for taxes may be sold at private sale, see *Muirhead v. Sands*, 111 Mich. 487; *Mann v. Carson*, 120 Mich. 631. Notice of a private sale held unnecessary where notice had been given of the public sale at which the lands went to the state: *Newton v. Raper*, 150 Ind. 630.

¹ *State v. Recorder*, 45 La. An. 556. A county in Kansas which takes a tax-title cannot sell for less than the statutory cost of redemption: *Noble v. Cain*, 22 Kan. 493. And in Nebraska a sale and assignment by county commissioners of tax-certificates for less than the amount of the taxes due thereon, where the property, if sold, would bring the full amount of the taxes, was held to infringe the constitutional prohibition against commuting taxes: *State v. Graham*, 17 Neb. 43. See a special case as to a sale by a Kansas county of its tax-certificates in gross: *Morrill v. Douglass*, 14 Kan. 293.

² *Baker v. Briggs*, 99 Va. 360. It must, for example, state the applicant's readiness to pay interest on the state's demands: *Ibid.* Held not sufficiently to state the amount the applicant was prepared to pay: *Lewis v. Coons*, 96 Va. 506. As to the service of the application for leave to purchase, see *Thomas v. Jones*, 94 Va. 756. As to the necessity of accompanying the application with money to pay all taxes, see *Hall v. Mann*, 122 Mich. 13; *Moore v. Auditor-General*, 122 Mich. 599.

³ See *Martinez v. State Tax Collector*, 42 La. An. 677; *State v. Recorder*, 45 La. An. 556; *Jenison v. Conklin*, 114 Mich. 9; *Hughes v. Jordan*, 118 Mich. 27; *Berkey v. Burchard*, 119 Mich. 101; *Hall v. Mann*, 122 Mich. 13; *Moore v. Auditor-General*, 122 Mich. 599; *Hoyt v. Chapin* (Minn.), 89 N. W. Rep. 850; *Doherty v. Real Estate Title Ins. etc. Co.* (Minn.), 89 N. W. Rep. 853; *Murdock v. Chaffee*, 67 Miss. 740.

⁴ *Eldridge v. Richmond*, 120 Mich. 586; *Youngs v. Povey*, 127 Mich. —.

⁵ *Martin v. Barbour*, 34 Fed. Rep. 701, 140 U. S. 634. And see *Fleming v. McGee*, 81 Ala. 409; *Textor v. Shipley*, 86 Md. 424; *Wilcox v. Leach*, 123 N. C. 74; *State v. Collins*, 48 W. Va. 64. Under a statute providing

the original owner has been cut off, so that his only right is that of redemption within the statutory time, he cannot attack the validity of a sale by the state, or bring suit to prevent or remove a cloud on the title.¹ It has even been held that a city, to which, in default of bidders, land has been struck off at a tax-sale, may, unless the charter prohibits, deal directly with the owner of the land, taking from him a mortgage to secure the payment of the delinquent taxes, and surrendering to him the certificate of sale.²

Different sales at the same time. Where the taxes of several years are delinquent at the same time, sales are sometimes permitted to be made separately for each year's tax. Such sales might raise serious questions between purchasers, if two or more should severally buy the land at sales bearing the same date and subject to the same redemption. In Iowa it seems that such separate sales are not authorized.³ Such questions might and should be settled by statute.

that any one may pay the charges against lands bid in by the state for taxes, and that the auditor shall convey to him the state's title, one who complies therewith is entitled to whatever title the state acquired at the tax-sale, and in *mandamus* to compel a conveyance the validity thereof cannot be questioned: *McCulloch v. Stone*, 64 Miss. 378. It was held in *Pigott v. O'Halloran*, 37 Minn. 415, that the rights of a purchaser from the state vest only from the date at which a certificate of the assignment of the state's rights is delivered to him. In *Marble v. Fife*, 69 Miss. 596, a statute providing for the sale of all lands held by the state under tax-sales, and not redeemed, and that all such sales should vest an indefeasible title against all but those under disability, was sustained.

¹ See *De Forest v. Thompson*, 40 Fed. Rep. 375; *Reinach v. Duplantier*, 46 La. An. 151; *Gowland v. New Orleans*, 52 La. An. 2042; *Parsons v.*

Newman, 99 Va. 298; *Baker v. Buckner*, 99 Va. 368.

² *Buffalo v. Balcom*, 134 N. Y. 532. At any rate the mortgager or persons claiming under him could not set up the defense of *ultra vires* in a suit by the city to foreclose the mortgage, since the benefit conferred by the mortgage—an extension of time within which to pay the mortgage—has been enjoyed by him or them: *Ibid*.

³ *Preston v. Van Gorder*, 31 Iowa 250; *Shoemaker v. Lacey*, 38 Iowa 277. Where the treasurer on the same day made different sales of the same land for the taxes of different years, and the owner, being aware of but one sale, had redeemed therefrom in good faith, he was held entitled to redeem from the other after the statutory time, by paying the amount for which the land was sold, with interest and penalty: *Shoemaker v. Lacey*, 38 Iowa 277, citing *Noble v. Bullis*, 23 Iowa 559. Where two tracts of land embraced re-

Certificate of sale. The sale is usually accompanied or followed by the issue to the purchaser of a certificate,¹ which recites the fact of sale,² and states the time when the purchaser will be entitled to a conveyance.³ This certificate should describe the land with reasonable certainty;⁴ should be offi-

spectively in an elder and a junior warrant and survey are assessed as distinct tracts as unseated lands, and are both bought in by the county, and afterwards are sold by the county on the same day, each to a different purchaser, the sales will be regarded as simultaneous, though one deed was delivered before the other, and the purchaser of the tract first sold to the county will take the land embraced within the interference of the two surveys: *Kunes v. McCloskey*, 115 Pa. St. 461; *McCloskey v. Kunes*, 142 Pa. St. 241. Under the Wisconsin statute authorizing a sale of land for taxes once for the aggregate of two years' taxes, if the assessment has been omitted one year and a levy and assessment made the next year, there must be but one sale of each parcel, and but one certificate can issue on each parcel: *Coleman v. Peshtigo Lumber Co.*, 30 Fed. Rep. 317. In Massachusetts, where land was advertised for sale at the same time in the same newspaper for the taxes of two successive years, and was sold first for the taxes of the earlier year, and then, at the same sale, to another purchaser for the taxes of the second year, it was held that the latter purchaser took the better title: *Keen v. Sheehan*, 154 Mass. 208. A purchaser of lands at a void tax-sale did not, it was held, carry with itself and invalidate the vendee's simultaneous purchase of the state's tax-title to the lands based on a sale for the taxes of a prior year: *Burns v. Ford*, 124 Mich. 274. A tax-deed was held void on its face which showed that contrary to the statute the land was put up for sale a second

time on the same day: *Mason v. Crowder*, 85 Mo. 526.

¹ As to the necessity of the certificate, see *Philbrook v. Smith*, 40 Minn. 100; *Pentecost v. Stiles*, 5 Okl. 500; *Wilson v. Wood* (Okl.), 61 Pac. Rep. 1045. A tax-sale is not invalid because the tax-collector's certificate was not dated, or because the auditor's certificate did not show when it was received in his office: *Corburn v. Crittenden*, 62 Miss. 125. Compare *Mills v. Scott*, 62 Miss. 525.

² Omission of date of sale avoids certificate: *Gilfillan v. Hobart*, 35 Minn. 185. Certificate held void for not clearly indicating for what taxes judgment was rendered: *Cool v. Kelly*, 78 Minn. 102. And for not showing that the price for which each lot was sold was the highest sum bid: *Davis v. Corlin*, 77 Minn. 742. And for not reciting that each tract or parcel was first offered to the bidder who would pay the amount for which it was to be sold for the shortest term of years, etc.: *Linde v. Canfield*, 40 Minn. 541. Averment as to payment of subsequent taxes: *Pfefferie v. Wieland*, 55 Minn. 202; *Cushman v. Taylor* (Neb.), 90 N. W. Rep. 207. The certificate will be sufficient if from it can fairly be gathered all essential particulars: *Keith v. Freeman*, 43 Ark. 296.

³ Recital erroneous in this respect held not to invalidate certificate: *Stout v. Coates*, 35 Kan. 382; *Muirhead v. Sands*, 111 Mich. 487.

⁴ See *Smith v. Blackiston*, 82 Iowa 240; *Concordia L. & T. Co. v. Van Camp* (Neb.), 89 N. W. Rep. 744; *Murphey v. Hall*, 68 Wis. 202; *Rein-*

cially signed;¹ should be under seal if the statute so requires;² and, to be valid, should be executed within a reasonable time.³ A certificate made for a term longer than that prescribed by law will be invalid.⁴ If based on a void levy the certificate gives no lien on the property which it describes.⁵ The certificate is evidence of the sale, although it is said that the record of sale is better evidence.⁶ And frequently the statute makes the certificate *prima facie* evidence that all the requirements of law in respect to the sale has been complied with,⁷ or even that all the prior proceedings—including the

hart v. Oconto County, 69 Wis. 352; Cate v. Werder (Wis.), 89 N. W. Rep. 822. Sale held void where the certificate called for 120 acres instead of eighty, the amount properly sold; and this, though the deed called for eighty: Olsen v. Bagley, 10 Utah 492. It was held in State v. Pinckney, 22 S. C. 484, that the certificate could not affect the question of ownership of lands by erroneously including them within its boundaries. Where the officer, at the purchaser's request, includes several tracts in one certificate, he will be entitled to fees as though he had given separate certificates: Bagley v. Shoppach, 47 Ark. 72. As to the validity, in Minnesota, of a certificate including several distinct tracts or lots, see Sanborn v. Mueller, 38 Minn. 27.

¹ Billings v. Stark, 15 Fla. 296.

² Lockwood v. Gehlert, 127 N. Y. 241.

³ Stewart v. Minneapolis & St. L. R. Co., 36 Minn. 355; Gilfillan v. Chat-terton, 37 Minn. 11; Kipp v. Hill, 40 Minn. 188; Smith v. Lambert, 68 Minn. 313. In Nebraska the certificate is not invalid because of having been made out several months after the sale: Otoe County v. Brown, 16 Neb. 394. And in People v. Cady, 105 N. Y. 295, it was held that though actually made out and delivered some time after the sale, the certificate relates back to the time of the

sale, and properly should bear the date of the sale; but that the bearing of a subsequent date is not fatal.

⁴ In re Report of Commissioners, 49 N. J. L. 488. Such a certificate is nevertheless evidence that the premises had in fact been struck off to the city for taxes mentioned therein, and, when regularly recorded, is notice to any purchaser from the owner. Such purchaser takes his title at the risk of a curative act by the legislature: Ibid.

⁵ John v. Connell (Neb.), 85 N. W. Rep. 82.

⁶ McCready v. Sexton, 29 Iowa 356; Henderson v. Oliver, 32 Iowa 512; Clark v. Thompson, 37 Iowa 536. Where the tax record and the certificate of sale conflict as to the interest sold, the former controls: Kneeland v. Hull, 116 Mich. 55. Where there is a discrepancy as to the date of sale between the auditor's certificate of sale and the entry made by him after the sale in the "copy judgment book," the former must control in the absence of any other evidence as to which is correct; at least where no question is involved as to when the right of redemption expires: McQuade v. Jaffray, 47 Minn. 326, distinguishing Gilfillan v. Hobart, 35 Minn. 185.

⁷ But this would not make it evidence of the tax-judgment: Sanborn v. Cooper, 31 Minn. 307. The fact that two certificates have been is-

levy of the taxes, the assessment, equalization, advertisement, sale, and payment of the purchase-money — have been regular.¹ But a statute providing that after a certain period the certificate of sale shall be presumptively conclusive does not apply where the sale is void for want of jurisdiction in the board levying the tax.² The rights of the purchaser under a certificate of sale are not uniform in the different states. In some he would perhaps be recognized as owner of an estate subject to be defeated on the making of the statutory redemption;³ in others as owner of an inchoate title which would become complete if the time for redemption expired without its being made.⁴ In some states the purchase gives a lien

sued — one that the auditor had sold a single tract for a certain sum, and the other that at the same sale he had sold to the same purchaser six separate tracts, including the one named in the first certificate, for a certain other and larger sum — does not destroy the effect of the first-named certificate as *prima facie* evidence of the facts stated therein: *Bennett v. Blatz*, 44 Minn. 56. Evidence held not to rebut the *prima facie* evidence furnished by the tax-assignment certificates that notice of sale was duly posted: *McNamara v. Fink*, 71 Minn. 66. The certificate has the *prima facie* effect given it by statute even where, because of loss or destruction, its contents are proved by parol: *Mitchell v. McFarland*, 47 Minn. 535.

¹See *Bryant v. Estabrook*, 16 Neb. 217; *Darr v. Wisner* (Neb.), 88 N. W. Rep. 518; *Darr v. Berquist* (Neb.), 89 N. W. Rep. 256; *Ure v. Reichenberg* (Neb.), 89 N. W. Rep. 414; *Ryan v. West* (Neb.), 89 N. W. Rep. 416; *Concordia L. & T. Co. v. Van Camp* (Neb.), 89 N. W. Rep. 744; *Starr v. Voss* (Neb.), 89 N. W. Rep. 750. And the certificate is presumptive evidence of a sale to the purchaser named therein: *Leavitt v. Mercer Co.* (Neb.), 89 N. W. Rep. 426. Where no evidence was offered to show that the persons who

formerly owned the lands were the same persons from whom taxes were due, except that the tax-list showed taxes due from persons of the same name, it was held that the certificate of sale was, under the statute, "presumptive evidence of the regularity of all prior proceedings," and that this presumption was not rebutted: *Basnight v. Smith*, 112 N. C. 229. In an action to quiet title by one whose land has been sold to pay a special assessment thereon, the certificate of sale is admissible to show that it conformed to the statutory requisites, and that the deed contained all the recitals in the certificate as required by law: *Clarke v. Mead*, 102 Cal. 516. It was held in *Smith v. Ryan*, 88 Ky. 636, that the certificate or the deed could not be used to prove the jurisdiction of the officer who made the sale.

²*People v. Wemple*, 67 Hun 495.

³See *Stebbins v. Guthrie*, 4 Kan. 353. Recording certificate held to be essential to set time to redeem running: *Morton v. Reeds*, 9 Mo. 868.

⁴"The general rule is 'until the expiration of the time for redemption and the execution and delivery of the deed, the title to the land sold remains with the execution debtor': *Betts v. Dick*, 1 Pennewill 268. To the same effect are *Johnson v.*

merely,¹ and provision has been made in some cases for a suit to foreclose this lien, in which suit all questions affecting the validity of the sale might be passed upon.² Pending the right

Smith's Adm'r, 70 Ala. 108; Stephens v. Holmes, 26 Ark. 48; Flemister v. Flemister, 83 Ga. 79; Bailey v. People, 158 Ill. 52; Tilson v. Thompson, 10 Pick. 359; Boardman v. Boozewinkel, 121 Mich. 320; Hilton v. Smith, 134 Mo. 499; Burgin v. Rutherford, 56 N. J. Eq. 666; State v. Godfrey, 62 Ohio St. 18; Alexander v. Bush, 46 Pa. St. 62; Singer's Appeal (Pa.), 7 Atl. Rep. 800; Hightower v. Freedle, 5 Sneed 312; Langdon v. Templeton, 66 Vt. 173; Davenport v. Newton, 71 Vt. 11. In Arkansas it is held that the certificate is sufficient evidence of title to support, without a tax-deed, the defense of adverse possession: Worthen v. Fletcher, 64 Ark. 662. In California the purchaser at a tax-sale of land held under a certificate of purchase from the state acquires only an equitable title, and the certificate holder, on completing his purchase and procuring a patent, may recover the land in ejectment against the tax-purchaser where no equitable defense was pleaded: Dorn v. Baker, 96 Cal. 206. In Illinois the certificate does not even constitute color of title: Harrell v. Enterprise Savings Bank, 183 Ill. 538. The purchaser in Michigan cannot, before he gets his deed, sue to quiet his tax-title, nor can he set it up as a defense against the original owner: Boardman v. Boozewinkel, 121 Mich. 320. And under the Michigan statute providing that no tax-sale purchaser shall enter into possession until six months after he has given the owner notice of the purchase, within which time the latter may redeem, such a purchaser who fails to give the notice obtains no possessory title to the land entitling him to enter and cut timber thereon: Huron Land Co. v. Robarge

(Mich.), 87 N. W. Rep. 1032, citing Corrigan v. Hinkley, 125 Mich. 125. As to entering under tax-certificate and cutting timber before receiving deed, question of good faith of possession: Busch v. Nester, 62 Mich. 381. The purchaser of a tax-title in possession of lands under a certificate of sale is not authorized by common law or by statute to cut timber during his term: Brewer v. Ireland (N. J.), 50 Atl. Rep. 437.

¹ See Spratt v. Price, 18 Fla. 289; Spaulding v. Ellsworth, 39 Fla. 76; Morrison v. Jacoby, 114 Ind. 84; McDonald v. Geisendorff, 128 Ind. 153; Phillips v. Myers, 55 Iowa 265; Roberts v. First Nat. Bank, 8 N. D. 504. While the Indiana statute provides that a certificate of tax-sale shall entitle the holder to possession, such certificate does not confer the right of possession unless the sale was regular and valid: Davis v. Chapman, 24 Fed. Rep. 674, citing Barton v. McWhinney, 85 Ind. 481. It was held in Wagner v. Stewart, 143 Ind. 78, that in Indiana a tax-purchaser of an insane person's land is not entitled, before the expiration of the right to redeem, to possession of the land.

² See Abbott v. Union Mut. L. Ins. Co., 127 Ind. 70; Adams v. Osgood, 60 Neb. 779; Manseau v. Edwards, 53 Wis. 457. In North Dakota a suit in equity in the nature of a suit to foreclose a mortgage does not lie to foreclose a tax-lien, the statutory remedy being exclusive: McHenry v. Kidder County, 8 N. D. 413. In Illinois an independent bill in equity cannot be maintained by the holder of a tax-lien or tax-title for a decree against the owner of the fee requiring repayment of the amount paid in dis-

to redeem the purchaser would doubtless have the same rights to protect his interests which would exist in analogous cases

charging taxes against the lands: *Gage v. Eddy*, 186 Ill. 432. The suit in Nebraska is purely equitable in nature, and a proceeding *in rem*: *Grant v. Bartholemew*, 57 Neb. 673; *Carman v. Harris*, 61 Neb. 635. In Wisconsin the statutory suit may be resorted to even though a deed has been given, if the deed proves to be void: *Potts v. Cooley*, 56 Wis. 45. So in Nebraska the action to foreclose a tax-lien on land may be brought on the tax-certificate where it is alleged in the petition that a deed would be invalid if issued: *Helprey v. Redick*, 21 Neb. 80; *Parker v. Matheson*, 21 Neb. 546. Or if the deed issued is invalid by reason of an irregularity in the proceedings leading up to the sale; but this rule cannot be invoked when, in his petition, the purchaser alleges that the treasurer made the sale to him without authority of law: *Ledwich v. Connell*, 48 Neb. 172. The Nebraska statute does not forbid the owner of the certificate from foreclosing the same, though the owner of the land may be an infant: *Leavitt v. Bell*, 55 Neb. 57. The assignee of a certificate issued to a county in North Carolina allowed to proceed to foreclose in an action originally brought to recover the land: *Collins v. Bryan*, 124 N. C. 738. In Nebraska the equitable owner and holder of a tax-sale certificate may sue in his own name to foreclose, though it has never been formally indorsed by the original purchaser, as provided by the statute: *Leavitt v. Bell*, 55 Neb. 57. It is not essential in Nebraska to the foreclosure of a tax-lien by the purchaser at a void tax-sale that the statutory notice of the expiration of the time to redeem be served on the owner or occupant: *Bryant v. Estabrook*, 16 Neb. 217; *McClure v. Lavender*, 21 Neb. 181; *Van Etten v.*

Medland, 53 Neb. 569; *Grant v. Bartholemew*, 57 Neb. 673; *Merrill v. Ijams*, 58 Neb. 706; *Carman v. Harris* (Neb.), 85 N. W. Rep. 848. A petition to foreclose a tax-lien which does not show that two years have expired from the time of the sale does not state a cause of action: *Iodence v. Peters* (Neb.), 89 N. W. Rep. 1041. As to the averments in the petition, see, also, *Carman v. Harris*, 61 Neb. 635; *Darr v. Berquist* (Neb.), 89 N. W. Rep. 256; *Pier v. Prouty*, 67 Wis. 218. In an action to foreclose a tax-lien the owner of the equity of redemption is a necessary party: *Alexander v. Thacker*, 30 Neb. 614. But in foreclosing a tax-lien upon land where a railroad company has a right of way, the company is not a necessary party if the right of way is excepted in the petition: *Carman v. Harris*, 61 Neb. 635. In Washington the owner of a lien for general taxes may foreclose it without first paying the city the amount of special assessments against the property: *McMillan v. Tacoma* (Wash.), 67 Pac. Rep. 68. The defendant in a suit to foreclose a tax-certificate in Wisconsin cannot avail himself of irregularities not going to the groundwork of the tax without offering to pay the amount for which the land was sold together with subsequent taxes and interest, as required by the statute: *Pier v. Prouty*, 67 Wis. 218. In Indiana the buyer of a tax-claim who got it for less than the sum due by falsely representing that he bought it in the interest of the land-owner may enforce it for its full amount, he not having acted as the owner's agent or under an agreement with the owner to give him the benefit of the discount: *Culbertson v. Munson*, 104 Ind. 451. As to the interest and fees recoverable in Ne-

of purchases at judicial sales.¹ In the case of a purchase from the state of lands which it has bid in for taxes, the purchaser's rights will vest only from the date at which he receives his certificate where he has failed to complete his payment before that time; and his purchase will be subject to the provisions of the statute in force at that time as to giving notice of the expiration of the right of redemption.²

In general, the right to assign³ a certificate will be found

braska, see *Stegeman v. Faulkner*, 42 Neb. 53; *Adams v. Osgood*, 42 Neb. 450; *Alexander v. Thacker*, 43 Neb. 494. In Nebraska, where suit to enforce a tax-lien is not brought within five years from the expiration of the time to redeem, the lien is extinguished: *Adams v. Osgood*, 42 Neb. 450; *Osgood v. Westover* (Neb.), 89 N. W. Rep. 746. And as to the statutory limitation of the right to foreclose such a lien, see *Brown v. Fodder*, 81 Ind. 291; *Bowen v. Striker*, 87 Ind. 317; *Montgomery v. Aydelotte*, 95 Ind. 144; *Helprey v. Redick*, 21 Neb. 80; *Parker v. Matheson*, 21 Neb. 546; *Shepherd v. Burr*, 27 Neb. 432; *D'Gette v. Sheldon*, 27 Neb. 829; *Alexander v. Wilcox*, 30 Neb. 793; *Warren v. Demary*, 33 Neb. 327; *Black v. Leonard*, 33 Neb. 745; *Alexander v. Shaffer*, 38 Neb. 812; *Alexander v. Thacker*, 43 Neb. 494; *Hathaway v. Nelson*, 52 Neb. 109; *Carson v. Broady*, 56 Neb. 648; *Stevens v. Paulsen* (Neb.), 90 N. W. Rep. 211.

¹See *Ferguson v. Miles*, 3 Giln. 358; *Stout v. Keyes*, 2 Doug. (Mich.) 184. A statute giving a tax-purchaser an action for waste committed between the time of the sale and the giving of the deed will not entitle him to the timber cut during that period, but only to damages: *Lacy v. Johnson*, 58 Wis. 414, citing *Northrup v. Trask*, 39 Wis. 515.

²*Pigott v. O'Halloran*, 37 Minn. 415.

³As to assignment by county treasurer to city, see *Lovelace v. Tabor*, etc. Co. (Colo.), 88 N. W. Rep. 892.

Purchase by old county from new: *Gilbert v. Dutruit*, 91 Wis. 661. As to what will constitute a valid assignment, see *Sanders v. Ransom*, 37 Fla. 457; *American Exch. Nat. Bank v. Crooks*, 97 Iowa 244; *Chrisman v. Hough*, 146 Mo. 102; *Green v. Heluran* (Neb.), 90 N. W. Rep. 913; *Territory v. Perea* (N. M.), 30 Pac. Rep. 928; *White v. Brooklyn*, 122 N. Y. 53; *Wilson v. Wood* (Okl.), 61 Pac. Rep. 1045. Assignment to firm instead of to individual partners by name, held valid: *McFadden v. Goff*, 32 Kan. 415. Quitclaim deed by holder of certificate operates as an assignment: *Boardman v. Boozewinkel*, 121 Mich. 320; *Leavitt v. Bell*, 55 Neb. 57. Acknowledgment of assignment, when necessary: *Wilson v. Wood*, *supra*; *Mattocks v. McLain Land & Inv. Co.* (Okl.), 68 Pac. Rep. 501. Filing notice, when unnecessary: *White v. Brooklyn*, 122 N. Y. 53. Recording assignment, effect of omission; *Swan v. Whaley*, 75 Iowa 623. Tax-deed to assignee held invalid for not showing the assignment of the certificate: *Sanders v. Ransom*, 37 Fla. 457. A tax-deed issued to one as assignee when he is not is void: *Smith v. Todd*, 55 Wis. 459; *Dreutzer v. Smith*, 56 Wis. 292. But defects in the assignment cannot be alleged after the statutory period of limitations has run: *Hazeltine v. Simpson*, 58 Wis. 579. In Kansas a tax-deed to one as assignee proves the assignment, and the land-owner cannot disprove it: *Gardenhire v. Mitchell*, 21 Kan. 83.

to be given by statute, and, when exercised, the assignee becomes entitled to all the rights acquired by the purchase; to the redemption-money if redemption is made, and to a deed if it is not.¹ But he will acquire no rights superior to those of his assignor.² And if the tax-sale purchaser was incompetent to buy and hold a tax-title, he cannot make a valid assignment.³ It has been held that after assignment the purchaser cannot be reinvested in his ownership by procuring the certificate to be redelivered to him and erasing the assignment.⁴

Recital in tax-deed that the certificate was assigned to the grantee by the county is sufficient: *Sanger v. Rice*, 43 Kan. 580. In *Wilcox v. Leach*, 123 N. C. 74, it was held that in an action under a tax-deed for the possession of land plaintiff could be shown to be the tax-purchaser's assignee, although the deed does not set forth the assignment.

¹See *McCauslin v. McGuire*, 14 Kan. 234; *Smith v. Stephenson*, 45 Iowa 645. Where a tax-certificate has been assigned, a second assignment by the purchaser is void, even as against the original owner: *Smith v. Todd*, 55 Wis. 459, citing *State v. Winn*, 10 Wis. 301, and *Horn v. Garry*, 49 Wis. 464.

²*Felch v. Travis*, 92 Fed. Rep. 210; *Boardman v. Boozewinkel*, 121 Mich. 320; *Brown v. Cohn*, 95 Wis. 90. The purchaser of a tax-certificate or tax-title is not a *bona fide* purchaser. He buys under the rule *caveat emptor*: *Brown v. Cohn*, *supra*. He takes the certificate subject to all infirmities: *Light v. West*, 42 Iowa 138; *Besore v. Dosk*, 43 Iowa 211. But see *Jefferson Land Co. v. Grace*, 57 Ark. 423, where it was held that a tax-deed procured by fraud was not void as against a *bona fide* assignee of the tax-sale purchaser, even though such purchaser was the state's attorney who prosecuted the tax-suit, since the fraud only renders

the sale voidable as against persons claiming under it with notice. And the same case held that the possession by the former owner of land sold for taxes is no notice to one purchasing a tax-title before the time for redemption expires of any infirmity in the tax-sale, since such possession is entirely consistent with the tax-purchaser's right. Such a vendee is not required to look for irregularities beyond the tax-record. It was decided in *Brown v. Cohn*, *supra*, that the purchaser of a tax-certificate pending a suit to which his vendor is a party, to annul the certificate, is bound by the judgment though no *lis pendens* was filed. The assignee of a county which had purchased at a tax-sale is not entitled to a deed, but merely to a foreclosure of the certificate: *Felch v. Travis*, 92 Fed. Rep. 210; *Huss v. Craig*, 124 N. C. 743; *Collins v. Bryan*, 124 N. C. 738. The purchaser of a tax-certificate cannot bring ejectment before obtaining his deed: *Hibbard v. Rowe*, 51 Ala. 469; *Costley v. Allen*, 56 Ala. 198. Unless the statute expressly authorizes it. See *Billings v. McDermott*, 15 Fla. 60.

³*Jackson v. Jacksonport*, 56 Wis. 310.

⁴*Bird v. Jones*, 37 Ark. 195. But this would probably not be held in all the states.

Report of sale. A report of the sale by the officer who has made it is commonly provided for, sometimes for the purposes of a record¹ exclusively, and sometimes, also, because some other officer than the one who made the sale is to execute the deed. The making of this report is important to the landowner if his right to redeem is to depend upon or be ascertained by it, and then the failure to make it would be fatal.² If made, it should be filed or recorded in proper time,³ and should conform in its recitals and certification to the statutory requirements,⁴ and the deed, if one is given subsequently, must

¹ Provision that the clerk shall keep a record of each tract sold for taxes, etc., held mandatory: *Martin v. Allard*, 55 Ark. 218; *Cooper v. Freeman Lumber Co.*, 61 Ark. 36; *Salinger v. Gunn*, 61 Ark. 414; *Taylor v. State*, 65 Ark. 595. Such record determines the amount of the taxes, costs, and penalty for which the land was sold: *Cooper v. Freeman Lumber Co.*, 61 Ark. 36. Where the record recites that the land was bid in for taxes, and a certain amount as penalty and costs, parol evidence is admissible to show what was included in the costs: *Darter v. Houser*, 62 Ark. 475.

² *Martin v. Barbour*, 140 U. S. 634, 34 Fed. Rep. 701; *Bradford v. Hall*, 36 Fed. Rep. 801; *De Forest v. Thompson*, 40 Fed. Rep. 375; *Lasher v. McCreery*, 66 Fed. Rep. 834; *Cook v. Lasher*, 73 Fed. Rep. 701, 19 C. C. A. 654; *King v. District of Columbia, MacA. & M.* 36; *Beale v. Brown*, 6 Mackey, 574; *Millard v. Truax*, 99 Mich. 157; *Zingerling v. Henderson (Miss.)*, 18 South. Rep. 432; *Jones v. Dills*, 18 W. Va. 759; *Orr v. Wiley*, 19 W. Va. 150. See *Burlew v. Quarrier*, 16 W. Va. 108. In Nebraska, if no proper return is made of lands sold for taxes at a public sale, a private sale is invalid. Under the curative statute in Michigan it will be presumed, unless the contrary is shown affirmatively, that the report

of sale was made: *Church v. Nester*, 126 Mich. 547.

³ *De Forest v. Thompson*, 40 Fed. Rep. 375; *Cook v. Lasher*, 73 Fed. Rep. 701, 19 C. C. A. 654; *Ellis v. Clark*, 39 Fla. 714; *Jenkinson v. Auditor-General*, 104 Mich. 34; *Landis v. Vineland Borough*, 61 N. J. L. 424; *Lippincott v. Pensauken T'p*, 62 N. J. L. 177; *Condon v. Galbraith*, 106 Tenn. 14; *Barton's Heirs v. Gilchrist*, 19 W. Va. 223. A statute requiring the county treasurer to make report "as soon as sales are confirmed," allows a reasonable time—ten days: *Detroit F. & M. Ins. Co. v. Wood*, 118 Mich. 31; *Youngs v. Peters*, 118 Mich. 45. Under a statute providing that an advertisement of a tax-sale should be recorded within ten days after the sale, a record of the advertisement made after the completion thereof, and thirteen days before the sale, was proper: *Stieff v. Hartwell*, 35 Fla. 606. It was held in *Langley v. Batchelder*, 69 N. H. 566, that a tax-sale was not invalidated by the collector's failure to file within ten days with the town clerk an account of the sale. In *McFadden v. Brady*, 120 Mich. 699, failure to file the report of sale was held not cured by the general curative provision of the tax-law. Premature report held not to invalidate sale jurisdictionally: *Burns v. Ford*, 124 Mich. 274.

⁴ See *Braxton v. Rich*, 47 Fed. Rep.

follow the report.¹ But where the case is such that a report is of no importance to the land-owner, he would probably not be heard to complain of a failure to make return, or of errors or imperfections in it.

Confirmation of sale. In some states a sale for delinquent taxes is not consummated until it is ratified or confirmed by the order or decree of a court.² Provision is generally made for the publication of notice calling on all persons who can set up any right to the lands purchased at the tax-sale, in consequence of any illegality connected with the sale, to show cause why the sale should not be confirmed.³ No one is to be heard

178; *McGrath v. Wallace*, 116 Cal. 548; *Jenison v. Conklin*, 114 Mich. 9; *Barnum v. Barnes*, 118 Mich. 264; *Gibbs v. Dortch*, 62 Miss. 671; *Cole v. Coon*, 70 Miss. 634; *National Bank v. Louisville, N. O. & T. R. Co.*, 72 Miss. 447; *Jones v. Blanchard*, 62 N. H. 651; *Jones v. Landis T'p*, 50 N. J. L. 374; *Henderson v. Hughes County*, 13 S. D. 576; *State v. Dugan*, 105 Tenn. 245; *McCormick v. Edwards*, 69 Tex. 106; *Bond v. Petit*, 89 Va. 674; *Dequasie v. Harris*, 16 W. Va. 345; *Barton's Heirs v. Gilchrist*, 19 W. Va. 223; *Winning v. Eakin*, 44 W. Va. 19. A report describing the land sold thus: "Quantity of land sold, 80 acres," without any further description, is defective: *Ladd v. Dickey*, 84 Me. 190. See, also, as to description of land in the report or return, *Pryor v. Hardwick (Ky.)*, 22 S. W. Rep. 545; *McCormick v. Edwards*, 69 Tex. 106; *Bond v. Pettit*, 89 Va. 474. A tax-sale, it was held in *Benton v. Merrill*, 68 N. H. 369, will not be invalidated because the account of sales filed with the town-clerk by the collector was an unattested copy of the original return, nor because the list of redemptions was made by the town-clerk upon information seasonably furnished by the collector. In *Riddle v. Messer*, 84 Ala. 236, a record of sales for taxes as well as a list of delinquent lands, was held to be a sufficient compliance with a statute requiring two books to be kept for the two purposes.

¹ *Boon v. Simmons*, 88 Va. 259; *Burlew v. Quarrier*, 16 W. Va. 108.

² See *Neal v. Andrews*, 53 Ark. 445; *Neal v. Wideman*, 59 Ark. 5; *Thompson v. Cox*, 42 W. Va. 566. The Arkansas statute was held to require only two regular annual payments of taxes after expiration of the right of redemption before confirmation of a sale for taxes: *Porter v. Tallman*, 68 Ark. 211. Under the Mississippi code giving the owner of a tax-title a right to bring a bill for confirmation "when the period for redemption has expired," a suit may be brought to confirm a tax-title acquired at a sale for taxes to the levee board; and it may be brought against infants interested in the land, without waiting until the expiration of the period of redemption after their disability has been removed: *Metcalf v. Perry*, 66 Miss. 68.

³ See *Lonergan v. Baber*, 59 Ark. 15; *St. Louis & S. F. R. Co. v. Holton-Warren Lumber Co.*, 61 Ark. 50; *Martin v. Hawkins*, 62 Ark. 421. An action to confirm a tax-title against unknown owners in which claimant gave no notice to parties whom he

to oppose confirmation who is not interested adversely.¹ Under certain statutes an order of ratification throws upon a person resisting the sale the burden of showing the illegality of the proceeding;² but a statute making such an order conclusive evidence of the regularity of the treasurer's proceedings except in case of fraud or collusion has been held void on the ground that it is not within the power of the legislature to make a claim of title conclusive evidence of its own validity.³ On the other hand, a decree confirming a tax-sale operates in some jurisdictions as a complete bar against all persons who may claim the land in consequence of illegality in the proceedings.⁴ A judgment confirming a sale of land to the state treasurer for taxes has been held, in an action to set aside the

knew to be occupying and claiming the land is void: *Trager v. Jenkins*, 75 Miss. 676.

¹ *Black v. Penfield*, 1 Ark. 472; *Thweatt v. Howard*, 68 Ark. 426; *Senichka v. Lowe*, 74 Ill. 274; *People v. Otis*, 74 Ill. 384. One describing himself simply as "tenant in possession" shows no right to be heard: *Black v. Penfield*, *supra*. But where, in these proceedings, plaintiff failed to show title in himself, it was not material to his rights whether his adversaries' claim was perfect or not: *Peterson v. Kittredge*, 65 Miss. 33.

² *Cooper v. Holmes*, 71 Md. 20. But in order to sustain such burden successfully it is not necessary that it be shown by positive testimony that there was some defect in the tax-sale: *Ibid*. And where a witness testifies that he prepared an order of ratification, and it appears that such an order was filed, but the contents of the order are not shown, it is erroneous to conclude as a matter of law that there has been a ratification of the tax-sale: *Ibid*. It was held in *Young v. Ward*, 88 Md. 413, that the presumption of the regularity of the proceedings, arising from an order of ratification of tax-sale, may be rebutted, and that such an order cannot be introduced by de-

fendant in ejectment as evidence of his title where more than three years have expired after the time for redemption.

³ *Baumgardner v. Fowler*, 82 Md. 631.

⁴ See *Lonergan v. Baber*, 59 Ark. 15. In an action for possession by a tax-sale purchaser such matters of defense as that the taxes for which the land was sold were assessed for years when the title was in the United States, and that the land was not taxable, cannot be made, being available only in the suit in which the decree of sale was rendered: *Burcham v. Terry*, 55 Ark. 398. Where, before the decree, the prior owner sold the land with warranty, he was not bound to defend against the confirmation, and, not being a party to the confirmation proceedings, he was not estopped from showing, in a subsequent suit against him on his warranty, that the forfeiture of the land for taxes, and the tax-sale, were void: *Ibid*. For a case where a tax-deed was held void because the decree under which it was made was delayed several years after the filing of the treasurer's report, and because the description differed from that in the report, see *Boon v. Simmons*, 88 Va. 259.

tax-title, void on its face for not reciting that the notice required by law had been served.¹ A decision, upon a bill to confirm a tax-title, that the taxes and the title are void does not impair the obligation of a contract, for there is no contract relation between the delinquent taxpayer and the tax-sale purchaser.²

The tax-deed. The deed is the last act in the execution of the statutory power, and all conditions precedent must be complied with before it can lawfully be given.³ One of the most

¹ Condon v. Galbraith, 106 Tenn. 14.

² Peterson v. Kittredge, 65 Miss. 33.

³ See Bolling v. Smith, 79 Ala. 535; Jackson v. Kirksey, 110 Ala. 547; McKinnon v. Mixon, 128 Ala. 612; Reddick v. Long, 124 Ala. 260; Smith v. Watson, 124 Ala. 339; Bailey v. Smith, 178 Ill. 72; Maguiar v. Henry, 84 Ky. 7; Hundley v. Taylor (Ky.), 25 S. W. Rep. 887; Waddill v. Walton, 42 La. An. 763. In West Virginia the tax-purchaser applies to the court for his deed, and must show in his petition all the facts entitling him to it: Davis v. Jackson, 14 Va. 227. A tax-deed based on a judgment including excessive costs is invalid: Fuller v. Shedd, 161 Ill. 462. And under the Missouri statute of 1877 it must be based upon a judgment in an action wherein the owner of the land, if known, and, if unknown, the person appearing of record to be the owner, was a party to the proceedings: Evans v. Roberson, 92 Mo. 192. Where, by statute, judgment for taxes could only be rendered at a specific term, or at some regular term upon notice, a deed given after judgment on notice to a subsequent adjourned term was void: Spurlock v. Dougherty, 81 Mo. 171. In Michigan a deed, though issued by the auditor-general, is void if not supported by a valid decree and sale: Citizens' Savings Bank v. Auditor-General, 123 Mich. 511. Auditor-general held justified in with-

holding a deed where payment had been made of entire amount asserted to be due by county treasurer: Hand v. Auditor-General, 112 Mich. 597. Or where it appeared the taxes were paid upon a part of the land within the time prescribed by law, and the auditor-general was unable to determine upon what part the lands were so paid: Kneeland v. Auditor-General, 113 Mich. 63. Where land sold for taxes has been seasonably redeemed a deed thereafter issued is void: Gage v. Bailey, 115 Ill. 646; Stokes v. Allen (S. D.), 89 N. W. Rep. 1023. Where by statute a deed is only to be given if there has been no redemption, it is not necessary to show that there has been no redemption, especially if the deed is *prima facie* evidence of title: Greve v. Coffin, 14 Minn. 345; Stewart v. Coulter, 31 Minn. 385. A mere showing that a tax-certificate was canceled as to a part of the real estate described therein does not deprive the holder of his right to a deed for the rest: Ogden v. Bemis, 125 Ill. 105. The fact that lands are in the constructive possession of a receiver of a federal court as part of the assets of an insolvent corporation does not defeat the right of a tax-sale purchaser to his deed: Rice v. Jerome, 97 Fed. Rep. 719, 38 C. C. A. 388; Whitehead v. Farmers' L. & T. Co., 98 Fed. Rep. 10, 39 C. C. A. 34.

important of those sometimes provided for is, that notice be served upon the owner of the record title; and in respect to such a requirement observance of the statute must be strict and particular,¹ and the statute itself is to be construed liberally and beneficially in behalf of the land-owner, its object being to protect him.² If the statute provides that a deed shall be given on production of the tax-sale certificate, such production is a condition precedent.³ And so is a requirement that all taxes constituting a lien on the land be paid.⁴ The deed will be void if issued prematurely,⁵ or if obtained after

¹ See *Gage v. Bani*, 141 U. S. 344; *Denike v. Rourke*, 3 Biss. 39; *Slyfield v. Healy*, 32 Fed. Rep. 2; *Emeric v. Alvarado*, 90 Cal. 444; *Gage v. Bailey*, 100 Ill. 530; *Wisner v. Chamberlin*, 117 Ill. 568; *Stillwell v. Brammell*, 124 Ill. 338; *Miller v. Pence*, 132 Ill. 149; *Smith v. Prall*, 133 Ill. 308; *Palmer v. Riddle*, 180 Ill. 461; *Langlois v. McCullom*, 181 Ill. 195; *Wilson v. Crafts*, 56 Iowa 450; *Reed v. Thompson*, 56 Iowa 457; *Ellsworth v. Van Art*, 67 Iowa 222; *Bowers v. Hallock*, 71 Iowa 218; *Chicago, B. & Q. R. Co. v. Kelley*, 105 Iowa 106; *Swan v. Harvey* (Iowa), 90 N. W. Rep. 489; *Jones v. Wilkinson*, 2 Kan. App. 361; *Le Blanc v. Blodgett*, 34 La. An. 107; *Breaux v. Negrotto*, 43 La. An. 426; *Church v. Smith*, 121 Mich. 97; *Sanborn v. Mueller*, 38 Minn. 27; *State v. Nord*, 73 Minn. 1. Where the affidavit on which a tax-deed is issued is wholly insufficient, the deed is void: *Wallahan v. Ingersoll*, 117 Ill. 123. And a deed void for want of notice cannot be made effective by the issue of an amended deed without notice, more than three years after the execution of the original: *Rector, etc. Co. v. Maloney* (S. D.), 88 N. W. Rep. 575. Where the holder of the tax-certificate has failed to comply with the statutory requirements concerning the giving of notice to redeem, the county treasurer will not be compelled by *mandamus*

to execute a deed: *State v. Gayhart*, 34 Neb. 192. See *Hintrager v. Traub*, 69 Iowa 746.

² *Merrill v. Dearing*, 32 Minn. 481; *Nelson v. Central L. Co.*, 35 Minn. 408.

³ *Thompson v. Merriam*, 15 Neb. 498. Such a provision does not apply to one taking out a second deed, when in taking out the first deed he had presented the certificate, which remained in the officer's custody: *Duggan v. McCullough*, 27 Colo. 43.

⁴ *Hughes v. Jordan*, 118 Mich. 27; *Cockburn v. Auditor-General*, 120 Mich. 643. If deed issues without such payment it will be void: *Ibid.* A new deed may be issued to the purchaser where the former deed has been canceled as void for non-payment of taxes: *Cockburn v. Auditor-General*, *supra*. In *Newby v. Brownlee*, 23 Fed. Rep. 320, a tax-deed was held not invalid because the subsequent taxes had not been paid at the date of making it.

⁵ A deed which shows on its face that it is prematurely executed is void: *Neil v. Spooner*, 20 Fla. 38. See *Fuller v. Shedd*, 161 Ill. 462. A deed issued before the expiration of the period of redemption is invalid: *Cable v. Coates*, 36 Kan. 191; *Richards v. Thompson*, 43 Kan. 209; *Little v. Edwards*, 84 Wis. 649; *Safford v. Conan*, 88 Wis. 354. Where proof of notice of the expiration of the time to redeem is required to be

the right to it has been barred.¹ When given the deed must be officially executed;² and a deed made after the officer's

filed ninety days before such expiration, a deed given before the ninety days have expired is void: *Swope v. Prior*, 58 Iowa 412; *Cummings v. Wilson*, 59 Iowa 14. And the landowner may rely on the official entries, in the absence of anything to warn him of their incorrectness, for the date of the expiration of the ninety days: *Ellsworth v. Green*, 59 Iowa 622. Under the Illinois statute providing that if a tax-sale purchaser suffers the land to be sold again within six months he shall not be entitled to a deed¹ for two years longer, a deed on the first sale is void if made within the time: *Maher v. Brown*, 183 Ill. 575. See *Gage v. Parker*, 103 Ill. 528; *Netterstrom v. Kemeys*, 187 Ill. 617; *Eggles-ton v. Gage*, 33 Ill. App. 184. In Kansas the purchaser is entitled to his deed when the regular time for redemption has expired, even though there may be a contingent right to redeem by minors, but he will take subject to such contingent right: *Gardenhire v. Mitchell*, 21 Kan. 83.

¹*Johns v. Griffin*, 76 Iowa 419; *Innes v. Drexel*, 78 Iowa 253; *Doud v. Blood*, 89 Iowa 237; *Alexander v. Wilcox*, 30 Neb. 793; *Fuller v. Colfax County*, 33 Neb. 716; *Hiles v. Cate*, 75 Wis. 91; *Whittlesey v. Hoppenyan*, 72 Wis. 140. See *Hintrager v. Traub*, 69 Iowa 746. Provision limiting the time within which a deed should be made held not applicable to the state: *Russ & Sons Co. v. Crichton*, 117 Cal. 695. Limitation in case of assignment by county: *Hotson v. Wetherby*, 88 Wis. 324. The latter case holds that, in the absence of adverse possession or expiration of the statutory period, the right to a deed or tax-certificate would not be lost by laches or abandonment. It was held in *White v. Brooklyn*, 122 N. Y. 53, that when

the time for making a conveyance was fixed at two years from the date of the tax-certificate, time was not of the essence of the contract, and the fact that no conveyance was demanded or offered operated to extend the time of redemption by acquiescence of the parties. In Iowa a purchaser who for eleven years fails to take out a deed will be presumed to have abandoned his purchase, and he cannot then dispute the title of the grantees of the record owner: *Ockendon v. Barnes*, 43 Iowa 615.

²The law in force at the time land is sold for taxes, and not the statute in force at the time a tax-deed is made, governs the execution thereof by the treasurer: *Ford v. Durie*, 8 Wash. 87. And in Mississippi the validity of a tax-title must be determined by the law as it existed at the time of the assessment and sale: *Capital State Bank v. Lewis*, 64 Miss. 727. In general the statute will provide in what name as grantor the deed shall be made. When it does not, a deed on a sale for a city tax should be in the name of the city: *Sams v. King*, 18 Fla. 557. A deed under such a sale in which the state is grantor is inoperative: *Stieff v. Hartwell*, 35 Fla. 606. The presumption of performance of official duty is sufficient to supply the name of the county and state when omitted from a tax-collector's deed, and there is no latent ambiguity by reason of such omission: *Lewis v. Siebles*, 65 Miss. 251. Tax-deeds to a county under a statute requiring the state and county to be named as grantors, which only name the county as grantor, are void: *Wine v. Woods (Ind.)*, 63 N. E. Rep. 759. As to the proper officer to execute tax-deed, see *Daniel v. Taylor*, 33 Fla. 636; *Barrows v. Wilson*, 39 La. An. 403; *Spur-*

term has expired is void unless expressly authorized by law.¹ The deed is also void if it gives no name of purchaser,² but a deed to a partnership is not void for that reason.³ If the deed is to one as assignee of the purchaser, there must be evidence, by recital therein or otherwise, of the fact of the assignment.⁴ That property sold for taxes was in the adverse possession of a third person before the deed was delivered does not render the conveyance invalid.⁵ It is no objection to a tax-deed that it was issued after the taxpayer's death.⁶

A deed has been held not to be void for want of a date;⁷ but the deed should conform to the statute in the formalities

lock v. Dougherty, 81 Mo. 171; Calahan v. Davis, 125 Mo. 27; Baxter v. Wade, 39 W. Va. 281; Ward v. Walters, 63 Wis. 39; Bemis v. Weege, 67 Wis. 435; Marx v. Hanthorn, 30 Fed. Rep. 579. As to execution by deputy-sheriff, see Marx v. Hanthorn, 30 Fed. Rep. 579. And by deputy auditor-general, see Fells v. Barbour, 38 Mich. 49; Westbrook v. Miller, 56 Mich. 148. And by deputy county-clerk, see Gilkey v. Cook, 60 Wis. 133. In California it is not necessary, before introducing a tax-deed in evidence, to prove that the person by whom it was executed held the office of tax-collector at the time the sale was made: Wetherbee v. Dunn, 32 Cal. 106.

¹ Marx v. Hanthorn, 30 Fed. Rep. 579; Doe v. Allen, 67 N. C. 346; Hoffman v. Bell, 61 Pa. St. 444. But see Cummings v. Cummings, 91 Fed. Rep. 602.

² Knowlton v. Moore, 136 Mass. 32; Eaton v. Lyman, 33 Wis. 34. Tax-deeds issued to a deceased grantee are void as issued to a non-resident grantee, and do not cut off prior titles: Paine v. Boynton, 124 Mich. 194. Tax-deed to the administrators of a deceased purchaser held void for want of authority to execute it under a statute authorizing execution only "to the original purchaser," and "to the assignee, by written indorsement

of the certificate of purchase:" Alexander v. Savage, 90 Ala. 383. Certificate to H. Coombs and deed to Hiram Coombs, identification of purchaser: Ogden v. Bemis, 125 Ill. 105.

³ Sherry v. Gilmore, 58 Wis. 324.

⁴ Florida Sav. Bank v. Brittain, 20 Fla. 507; Sanders v. Ransom, 37 Fla. 457; Neenan v. White, 50 Kan. 639. See Wilcox v. Leach, 123 N. C. 74. As to compliance of the tax-deed with the statutory recital required in Missouri as to the assignment, see Pitkin v. Reibel, 104 Mo. 505; Pitkin v. Shacklett, 106 Mo. 571; Atkinson v. Butler Imp. Co., 125 Mo. 565. A tax-deed issued to one as assignee when he is not is void: Smith v. Todd, 55 Wis. 459; Dreutzer v. Smith, 56 Wis. 292. In Kansas a tax-deed to one as assignee proves the assignment, and the land-owner cannot dispute it: Gardenhire v. Mitchell, 21 Kan. 83. Recital that certificate was assigned to grantee in tax-deed, held sufficient: Sanger v. Rice, 42 Kan. 580.

⁵ Fortman v. Wheeler, 84 Hun 278.

⁶ Currie v. Fowler, 3 A. K. Marsh. 504.

⁷ McMichael v. Carlyle, 53 Wis. 504. See Phelps v. Meade, 41 Iowa 470. Parol evidence held admissible to supply omitted day and month: Clark v. Holton, 94 Ga. 542. A deed operates, *inter partes*, from the date of its actual delivery, and the ac-

of execution,¹ such as signing,² sealing,³ witnessing,⁴ and acknowledgment,⁵ and it is generally held that, if it is defective or erroneous in these or any other particulars, a bill will not lie in equity to reform it.⁶ In some states a deed not duly recorded will be inadmissible in evidence — except as color of title — or will not be *prima facie* evidence.⁷ In other states

knowledge need not fix the date thereof: *Caruthers v. McLaran*, 56 Miss. 371.

¹ *Salmer v. Lathrop*, 10 S. D. 216.

² Under the Alabama code tax-deeds issued by a probate judge must be signed and acknowledged by him to pass title, or to make them *prima facie* evidence thereof: *Reddick v. Long*, 124 Ala. 260, and cases cited. Though the official designation of an officer authorized to execute tax-deeds is "county clerk," yet a deed signed by him as "clerk of board of supervisors" of the county is valid: *Bulger v. Moore*, 67 Wis. 430.

³ For cases holding that a tax-deed will be void unless under the proper seal, see *Deputron v. Young*, 134 U. S. 241; *Young v. De Putron*, 37 Fed. Rep. 46; *Reed v. Morse*, 51 Kan. 141; *Sutton v. Stone*, 4 Neb. 319; *Reed v. Merriam*, 15 Neb. 323; *Hendrix v. Boggs*, 15 Neb. 469; *Bendixon v. Fenton*, 21 Neb. 184; *Gue v. Jones*, 25 Neb. 634; *Larson v. Dickey*, 39 Neb. 463; *Thomson v. Dickey*, 42 Neb. 314; *McCauley v. Ohenstein*, 44 Neb. 89; *Dickey v. Paterson*, 45 Neb. 848; *Frank v. Scoville*, 48 Neb. 169; *Patterson v. Galliher*, 122 N. C. 511; *Salmer v. Lathrop*, 10 S. D. 216. Absence of seal from record of deed: *Hiles v. Atlee*, 90 Wis. 72. As to sufficiency of sealing in Wisconsin, see *Brown v. Cohn*, 85 Wis. 1; *Hunt v. Miller*, 101 Wis. 583. It was held in *Herron v. Murphy* (Pa.), 13 Atl. Rep. 958, that the official seal of county commissioners is not necessary to the validity of their deed of lands purchased for unpaid taxes.

⁴ See *Keech v. Enriquez*, 28 Fla.

597; *Gabe v. Root*, 93 Ind. 256; *Armstrong v. Hufty*, 156 Ind. 106; *Essax v. Meyers* (Ind. App.), 62 N. E. Rep. 96; *Semple v. Wharton*, 68 Wis. 626; *Whittlesey v. Hoppenyan*, 72 Wis. 140.

⁵ As to the necessity and sufficiency of the acknowledgment and certificate thereof, see *Hill v. Gordon*, 45 Fed. Rep. 276; *Johnston v. Sutton*, 45 Fed. Rep. 296; *Bird v. McClelland*, *Stumpf, etc. Co.*, 45 Fed. Rep. 458; *Jackson v. Kirksey*, 110 Ala. 547; *Smith v. Watson*, 124 Ala. 339; *Waddingham v. Dickson*, 17 Colo. 223; *Kelley v. McBlain*, 42 Kan. 764; *Douglass v. Bishop*, 45 Kan. 200; *Tilson v. Thompson*, 10 Pick. 359; *Edmonson v. Cranberry*, 73 Miss. 723; *Stierlin v. Daley*, 37 Mo. 483; *Dalton v. Fenn*, 40 Mo. 109; *Geary v. Kansas City*, 61 Mo. 378; *Dunlap v. Henry*, 76 Mo. 106; *Herron v. Murphy* (Pa.), 13 Atl. Rep. 958; *Lee v. Newland*, 164 Pa. St. 360; *Leftwich v. Richmond* (Va.), 40 S. E. Rep. 651; *Yorty v. Paine*, 62 Wis. 154. It is said in *Ellis v. Clark*, 39 Fla. 714, that a tax-deed in the form prescribed by the statute may be valid without being acknowledged or recorded. And in *Langley v. Batchelder*, 69 N. H. 566, it is said that as against a previously existing title the acknowledgment of a tax-deed is not essential to its validity.

⁶ *Keefer v. Force*, 86 Ind. 81; *Bowers v. Anderson*, 52 Miss. 596. *Contra*, *Hickman v. Kempner*, 35 Ark. 505. A mere clerical mistake in preparing a tax-deed may be corrected: *Smith v. Griffin*, 14 Colo. 429.

⁷ See *Hintrager v. Nightingale*, 36 Fed. Rep. 847; *Johnston v. Sutton*,

the validity of the deed does not depend, where no question of priority is made, upon its having been recorded.¹

What recitals the deed shall contain may or may not be determined by the statutes of the state. If a form is not given by statute enough should appear to show that the deed is made in execution of the statutory power.² If a form is given, and is followed, it must be held sufficient.³ A statute prescribing

45 Fed. Rep. 296; *Keech v. Enriquez*, 28 Fla. 597; *Tilson v. Thompson*, 10 Pick. 359; *Sintes v. Barber*, 78 Miss. 585; *Stierlin v. Daley*, 37 Mo. 483; *Dalton v. Fenn*, 40 Mo. 109. As to the sufficiency of the record, *Bardon v. Improvement Co.*, 157 U. S. 327; *Coleman v. Peshtigo Lumber Co.*, 30 Fed. Rep. 317; *Mundee v. Freeman*, 23 Fla. 529; *Beaubien v. Hindman*, 37 Kan. 292; *Whittlesey v. Hoppenyan*, 72 Wis. 140; *St. Croix Land, etc. Co. v. Ritchie*, 73 Wis. 409; *Hall v. Baker*, 74 Wis. 118; *Hiles v. Atlee*, 90 Wis. 72. As to registration of tax-deed before the expiration of the period of redemption, see *Davis v. Hurst (Tex.)*, 14 S. W. Rep. 610.

¹ *Fells v. Barbour*, 58 Mich. 49. See *Bracka v. Fish (Wash.)*, 63 Pac. Rep. 561.

² See *McDermott v. Sully*, 27 Ark. 326; *Hereford v. O'Connor (Ariz.)*, 52 Pac. Rep. 471; *Wetherbee v. Dunn*, 32 Cal. 106; *Davis v. Harrington*, 35 Kan. 134; *Jones v. Miracle*, 93 Ky. 639; *Wiggin v. Temple*, 73 Me. 380; *Ladd v. Dickey*, 84 Me. 190; *Skowhegan Sav. Bank v. Parsons*, 86 Me. 514; *Green v. Alden*, 92 Me. 177; *Gillfillan v. Chatterton*, 38 Minn. 335; *Bonham v. Weymouth*, 39 Minn. 92; *West v. St. Paul & N. P. R. Co.*, 40 Minn. 189; *Guffey v. O'Reiley*, 88 Mo. 418; *Bender v. Dugan*, 99 Mo. 126; *Western v. Flanagan*, 120 Mo. 61; *Burden v. Taylor*, 124 Mo. 12; *Atkinson v. Butler Imp. Co.*, 125 Mo. 565; *Loring v. Groomer*, 142 Mo. 1; *Baldwin v. Merriam*, 16 Neb. 199; *Shelby v. Towle*, 16 Neb. 194; *Ludden v.*

Hansen, 17 Neb. 354; *Marley v. Foster*, 102 Tenn. 241. In Arkansas a commissioner's deed of state lands forfeited for taxes requires no recitals: *Walker v. Taylor*, 43 Ark. 543. In Michigan, where the form of deed is not prescribed by the statute, a tax-deed from the auditor-general need not recite the proceedings prior to the sale. The recitals need show no more than the capacity in which the officer acts: *Sibley v. Smith*, 2 Mich. 486. And a tax-deed in the statutory form of quitclaim deeds, stating that the auditor-general quitclaims all the interest of the state in the lands, operates to convey title: *Dawson v. Peter*, 119 Mich. 274; *Mann v. Carson*, 120 Mich. 631. The power, under the New Jersey statute, to execute a tax-deed, was held, in *Meday v. Rutherford Borough*, 65 N. J. L. 645, not to give authority to make covenants of warranty; and the same case decided that the word "demise" in a tax-deed does not import a covenant for quiet enjoyment.

³ *Riddle v. Messer*, 84 Ala. 236; *Bowers v. Chambers*, 53 Miss. 259; *Bell v. Gordon*, 55 Miss. 45; *Hopkins v. Scott*, 86 Mo. 140. The statute in force when a deed is given will determine its sufficiency: *McCann v. Merriam*, 11 Neb. 241; *Covell v. Young*, 11 Neb. 510; *Baldwin v. Merriam*, 16 Neb. 199. The form of the deed may be changed by legislation after the purchase is made, and the purchaser cannot object when it does not injure him: *Gardenhire v. Mitchell*, 21 Kan. 83.

a particular form must be followed substantially,¹ and recitals required by law must not be omitted;² but where a recital is by statute necessary only under a particular state of facts, and that state of facts is not shown to exist, the omission of the recital does not affect the validity of the deed.³ Recitals should set forth the facts so that compliance with statutory requisites may appear upon the face of the deed. It is not sufficient to state merely conclusions of law such as that proceedings have been taken "in conformity with the provisions of" the statute,

¹ *Grimm v. O'Connell*, 54 Cal. 522; *Sessions v. McCarthy*, 118 Cal. 622; *Barnett v. Jaynes*, 26 Colo. 279; *State v. Jordan*, 36 Fla. 1; *Ropes v. Kemp*, 38 Fla. 233; *Pearce v. Tittsworth*, 87 Mo. 635; *Rector, etc. Co. v. Maloney (S. D.)*, 88 N. W. Rep. 575; *Lain v. Cook*, 15 Wis. 446. See *Adams v. Mills*, 126 Mass. 278. A deed of resident lands in the form required for non-resident, held void: *Jacks v. Dyer*, 31 Ark. 334. Slight departures from the statutory form will be overlooked: *Geekie v. Kirby, etc. Co.*, 106 U. S. 379; *Bowman v. Cockrill*, 6 Kan. 311; *Haynes v. Heller*, 12 Kan. 381; *Mack v. Price*, 35 Kan. 134; *Martin v. Garrett*, 49 Kan. 131. See *Hardie v. Chrisman*, 60 Miss. 671; *Brigins v. Chandler*, 60 Miss. 862. If the form as given by statute contains recitals which would make the sale invalid, they should be omitted: *Magill v. Martin*, 14 Kan. 67; *McCauslin v. McGuire*, 14 Kan. 234; *Morrill v. Douglass*, 14 Kan. 294. Thus the statutory form of a tax-deed, being for voluntary purchasers, should be modified, in the case of a deed based on a sale to the county, so as to show the conditions on which a county can lawfully become a purchaser; and a deed reciting a sale to the county as a competitive bidder is void on its face: *Hanenkratt v. Hamil (Okl.)*, 61 Pac. Rep. 1050. In Colorado, however, a deed substantially in the form required by statute was held not invalid as showing that

the county which purchased the land was a competitive bidder: *Lovelace v. Tabor Mines, etc. Co. (Colo.)*, 66 Pac. Rep. 892.

² See *Daniels v. Case*, 45 Fed. Rep. 843; *Sabati v. Briggs*, 55 Ga. 572; *Lunenburg v. Walter, etc. Co.*, 118 Mass. 540; *Reed v. Crapo*, 127 Mass. 39; *Pixley v. Pixley*, 164 Mass. 335; *Downing v. Lancy*, 178 Mass. 465; *Williams v. McLanahan*, 67 Mo. 499; *Hopkins v. Scott*, 86 Mo. 140; *Rice v. Shipman (Mo.)*, 1 S. W. Rep. 830; *Doff v. Neilson*, 90 Mo. 93; *Sullivan v. Donnell*, 90 Mo. 278; *Bingham v. Delougherty (Mo.)*, 13 S. W. Rep. 208; *Dameron v. Jamison*, 143 Mo. 483; *Haller v. Blaco*, 10 Neb. 36; *Thompson v. Merriam*, 15 Neb. 498. Where the statute required a second deed to recite "the loss and destruction of the former deed, and its date, if possible," a second deed in which the only reference to the first was "this is a second deed, issued under section 162, tax-law," was inadmissible in evidence in support of a tax-title: *Burroughs v. Goff*, 64 Mich. 464. A tax-deed will be void if it fails to comply with a statutory requirement that it recite "substantially the matter contained in the certificate," or "the matter recited in the certificate:" *Anderson v. Hancock*, 64 Cal. 455; *Hewes v. McLellan*, 80 Cal. 393; *Hughes v. Cannedy*, 92 Cal. 382; *DeFrieze v. Quint*, 94 Cal. 653.

³ *Barnett v. Jaynes*, 26 Colo. 279.

or "according to law," or "as directed by law."¹ If the deed contains recitals which the statute does not require they may be treated as surplusage.² It has been held that if the recitals in a tax-deed show the proceedings to have been in any respect defective, the deed cannot be helped by showing that those proceedings were in fact good.³ But it has also been held that parol evidence is admissible to supply omitted dates or to correct misrecitals.⁴ In some states if the recitals in the tax-deed do not conform to the facts a second and correct deed may be issued.⁵ When, however, the first deed was right, a second cannot be given to avoid the bar of the statute of limitations.⁶

If, by the statute, the land is to be conveyed, a deed of the right, title, and interest of the state is ineffectual where the land had never been forfeited to the state.⁷ And under a statute requiring a sheriff who has sold land for taxes to "execute to the purchaser a deed for the property sold, . . . which shall convey a title in fee to such purchaser," a deed which purports to convey the land sold, and not the interest of the owner simply, complies with the law.⁸

¹ See *Duncan v. Gillette*, 37 Kan. 156; *Ladd v. Dickey*, 84 Me. 190; *Maddocks v. Stevens*, 89 Me. 336; *Large v. Fisher*, 49 Mo. 307; *Moore v. Harris*, 91 Mo. 616; *Burden v. Taylor*, 124 Mo. 12. A deed void because not reciting the year in which the judgment was entered will not be held valid because the recitals inferred when the judgment was entered: *Dameron v. Jamison*, 143 Mo. 483.

² *Harper v. Rowe*, 55 Cal. 132; *Flanagan v. Grimmet*, 10 Grat. 421; *Hobbs v. Shumates*, 11 Grat. 516. The deed of a collector who had authority to make a sale is not vitiated by a reference therein to a superseded statute instead of to the existing act under which the sale is made: *Sims v. Walshe*, 49 La. An. 781. A deed in the statutory form, but containing recitals not required by the statute, is not evidence of the truth of such recitals: *Millikan v. Patterson*, 91 Ind. 515.

³ *Grimm v. O'Connell*, 54 Cal. 522;

Hubbell v. Campbell, 56 Cal. 527. But see *Caruthers v. McLaren*, 56 Miss. 371.

⁴ See *Bedgood v. McLain*, 89 Ga. 793; *Clark v. Holton*, 94 Ga. 542. It seems that in Rhode Island the facts going to show a regular sale may be proved by parol if the return of sale for which the statute provides is not made: *Thurston v. Miller*, 10 R. I. 358.

⁵ *Gould v. Thompson*, 45 Iowa 450; *Douglass v. Nuzum*, 16 Kan. 515. The only way in which the deed can be corrected as to mere form is held, in *Duff v. Neilson*, 90 Mo. 93, to be for the collector to make an entirely new deed, or to insert the correction in the old deed, which then must be re-acknowledged: *Duff v. Neilson*, 90 Mo. 93.

⁶ *Corbin v. Bronson*, 28 Kan. 532.

⁷ *Hodgdon v. Burleigh*, 4 Fed. Rep. 111; *Ketchum v. Mullinix*, 92 Mo. 118.

⁸ *Allen v. McCabe*, 93 Mo. 138. A deed conveying all the estate which

Here again description becomes important;¹ the description should, in substance at least, follow that in the assessment when the whole parcel assessed was sold, and if less than the whole, then the connection between what was assessed and what was sold should appear.² In either case the description should be one that with reasonable certainty identifies the land.³ Latent defects in description may be explained by

the grantor might sell under the tax-judgment is valid in respect of form: *Cruzen v. Stephens*, 123 Mo. 337.

¹ A tax-deed is void upon its face if it fails to describe the property: *McDonough v. Merlen*, 53 Kan. 120. So it is void upon its face if, in the granting clause, it omits to recite the land granted: *Wood v. Nicholson*, 43 Kan. 461.

² See *Grissom v. Furman*, 22 Fla. 581; *Carncross v. Lykes*, 22 Fla. 587; *Levy v. Ladd*, 35 Fla. 391; *Quivey v. Lawrence*, 1 Idaho 313; *Carlisle v. Cassady* (Ky.), 46 S. W. Rep. 490; *Blair Town, etc. Co. v. Scott*, 44 Iowa 143. If the description of land in a tax-deed departs from that in the assessment roll and the prior tax proceedings upon which the deed is based, it is void. Each act in the tax proceedings must substantially correspond with its immediate antecedent: *Stout v. Mastin*, 139 U. S. 151. So, where a tax-deed described the land sold as $4\frac{1}{2} \times 10$ rods, lot 5, block 33, plat B, less land than was described in the notice of sale, and more than was described in the assessment roll, the tax-sale was illegal: *Eastman v. Gurrey*, 15 Utah 410. Where there is a departure in the description in a tax-deed from that contained in the assessment roll and prior proceedings, the prior description, if imperfect and insufficient, avoids the deed, though the description in the latter may be perfect and complete: *Hewitt v. Starch*, 31 Kan. 488. Nor would the fact that the tax-deed purported to

convey the whole of a lot cure the indefinite assessment of the land, or supply proof that the tax was actually levied upon a specific and definite parcel: *Harding v. Greene*, 59 Kan. 202. In West Virginia it was held, if the whole tract is reported sold, a deed of a part only is valid: *Williamson v. Russell*, 18 W. Va. 612. As to setting off the land in Virginia where only a part is sold, see *Delany v. Goddin*, 12 Grat. 266; *Nowlin v. Burwell*, 28 Grat. 883. A tax-deed reciting that a part of a lot was sold for the taxes levied thereon, but reciting as the amount of the taxes the sum levied against the whole lot, is voidable and conveys no title: *York v. Barnes*, 58 Kan. 478. It was held in *Kneeland v. Hull*, 116 Mich. 55, that a tax-deed would not, in a suit to quiet title based thereon, be held absolutely void because it purports to convey the entire land, when in fact only an undivided interest was sold; the error might be corrected by the decree in such suit.

³ A tax-deed taking effect only as the execution of a statutory power should be construed with some strictness, so as to enable the grantee to identify the land, and the owner to redeem it: *Hill v. Mowry*, 6 Gray 551. A description in a tax-deed is sufficient to support adverse possession by the grantee therein if unaided by extrinsic facts it satisfies the mind that the land adversely occupied is embraced within the description contained in the deed: *Day*

extrinsic evidence.¹ Under some statutes there is authority to execute a second deed when the first is invalid for insufficient description.²

v. Needham, 2 Tex. Civ. App. 680. It is said in *Abbott v. Coates* (Neb.), 86 N. W. Rep. 1058, that the office of a description in a sheriff's deed is not to identify the lands but to provide the means of identification, and it is sufficient when this is done. In *Hill v. Mowry*, 6 Gray 551, it was held that a deed which bounds the land correctly on two sides, bounds it on the third by land on which, in fact, it is bounded in part only, and on the fourth by land from which it is separated by a third person's land, is void for uncertainty. A tax-deed of one hundred acres of a tract of six hundred is void, and does not entitle the grantee to have a hundred acres surveyed out as the land granted: *Humphries v. Huffman*, 33 Ohio St. 395. "Twelve acres pasture lot" held an insufficient description: *Libby v. Mayberry*, 80 Me. 137. A deed which describes the land as "lots 18 and 19 in block 6" is insufficient; it appearing that in the tract are many lots numbered 18 and many numbered 19: *Miller v. Williams* (Cal.), 67 Pac. Rep. 788. For further cases bearing on the certainty of description in a tax-deed, see *Stout v. Mastin*, 139 U. S. 151; *Doe v. Clayton*, 81 Ala. 391; *Zundel v. Baldwin*, 114 Ala. 328; *Jacks v. Chaffin*, 34 Ark. 534; *Hershby v. Thompson*, 50 Ark. 484; *Schattler v. Cassinelli*, 56 Ark. 172; *Wetherbee v. Dunn*, 32 Cal. 106; *Grisson v. Furman*,

29 Fla. 581; *Carnecross v. Lykes*, 22 Fla. 587; *Taylor v. Wright*, 121 Ill. 455; *Brickey v. English*, 129 Ill. 646; *Hanna v. Palmer* (Ill.), 61 N. E. Rep. 1051; *Armstrong v. Hufty*, 156 Ind. 106; *Judd v. Anderson*, 51 Iowa 345; *Collins v. Storm*, 75 Iowa 36; *Griffith v. Utley*, 76 Iowa 292; *Ellsworth v. Nelson*, 81 Iowa 57; *Tucker v. Carlson* (Iowa), 85 N. W. Rep. 901; *Wendell v. Whitaker*, 28 Kan. 690; *Martz v. Newton*, 29 Kan. 331; *Walker v. Boh*, 32 Kan. 534; *Harris v. Curran*, 32 Kan. 580; *Spicer v. Howe*, 38 Kan. 465; *Knote v. Caldwell*, 43 Kan. 464; *Gooch v. Bengel*, 90 Ky. 393; *Smith v. New Orleans*, 43 La. An. 726; *Libby v. Mayberry*, 80 Me. 137; *Green v. Alden*, 92 Me. 177; *Todd v. Lunt*, 148 Mass. 322; *Jackson v. Sloman*, 117 Mich. 126; *Sleight v. Rowe*, 125 Mich. 585; *Vetterly v. McNeal* (Mich.), 89 N. W. Rep. 441; *Eastman v. St. Anthony Falls Water Power Co.*, 43 Minn. 60; *Strauss v. McAllister* (Miss.), 5 S. Rep. 625; *Morgan v. Schwartz*, 66 Miss. 613; *Pearce v. Perkins*, 70 Miss. 276; *Brulie v. Cooney* (Miss.), 12 S. Rep. 463; *Herring v. Moses*, 71 Miss. 620; *Hughes v. Thomas* (Miss.), 29 S. W. Rep. 74; *Lowe v. Ekey*, 82 Mo. 286; *Western v. Flanagan*, 120 Mo. 61; *Roth v. Gabbert*, 123 Mo. 21; *Zink v. McManus*, 121 N. Y. 259; *Oakley v. Healey*, 38 Hun 244; *Minter v. Durham*, 13 Or. 470; *State v. Morrison*, 44 S. C. 470; *Wofford v. McKinna*, 23 Tex. 36; *Wooters v. Arledge*, 54 Tex.

¹ *Judd v. Anderson*, 51 Iowa 345; *Nelson v. Brodhack*, 44 Mo. 596; *Brown v. Walker*, 11 Mo. App. 226. Where the tax-deed and confirming decree describe the property as "fractional 38 acres in S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$," etc., assessed to C., evidence showing the title and location of two acres in

such 40-acre tract, not assessed to C. is admissible under the Mississippi code to identify the 38 acres: *Illinois Central R. Co. v. Le Blanc*, 74 Miss. 650.

² See *Duggan v. McCullough*, 27 Colo. 43.

Where parcels have been sold separately to the same person, they may be united in one conveyance.¹ It is held in Michigan that a deed covering two sales may be good if either

395; *Henderson v. White*, 69 Tex. 103; *Morgan v. Smith*, 70 Tex. 637; *Harber v. Dyches* (Tex.), 14 S. W. Rep. 580; *Ammons v. Dwyer*, 78 Tex. 639; *Claiborne v. Elkins*, 79 Tex. 380; *Day v. Needham*, 2 Tex. Civ. App. 680; *Boon v. Simmons*, 88 Va. 259; *Eastman v. Gurrey*, 15 Utah 410; *Mendota Club v. Anderson*, 101 Wis. 479. The decree and order of sale will control the description of the property to be sold; and where such decree and order except certain lots in a block, but the sheriff's deed conveys the entire block, no title as to the lots excepted in such decree and order is conveyed: *Abbott v. Coates* (Neb.), 86 N. W. Rep. 1058. An error in the description of one tract of land in a tax-deed will not invalidate the deed as to the tracts properly described: *Watkins v. Inge*, 24 Kan. 612.

¹ *Pettus v. Wallace*, 29 Ark. 476; *Pack v. Crawford*, 29 Ark. 489; *Montgomery v. Birge*, 31 Ark. 491; *Waddingham v. Dickson*, 17 Colo. 223; *Crisman v. Johnson*, 23 Colo. 264; *Barnett v. Jaynes*, 26 Colo. 279; *Stieff v. Hartwell*, 35 Fla. 606; *State v. Jordan*, 36 Fla. 1; *Watkins v. Inge*, 24 Kan. 612; *Dodge v. Emmons*, 34 Kan. 732; *Cartwright v. Korman*, 45 Kan. 515; *Allen v. White*, 98 Mo. 55; *Towle v. Holt*, 14 Neb. 221; *Bennett v. Darling* (S. D.), 86 N. W. Rep. 751. It is, however, held in not a few cases that a deed of distinct parcels separately sold should show the several sales. See the Arkansas cases cited *supra*; *Allen v. Buckley*, 94 Mo. 158. Evidence of separate sales: *Waddingham v. Dickson*, 17 Colo. 223. It was held in *Greer v. Wheeler*, 41 Iowa 85, that if two tracts are deeded as one parcel the deed may

be supported by evidence that they were separately sold or that they were sold because occupied as one. In *Hotson v. Wetherby*, 88 Wis. 324, a deed reciting in the statutory form that certain tracts were, for the non-payment of taxes, sold for a certain sum "in the whole," was held to mean, not that the tracts were sold together, contrary to law, but that the amount for which they were separately sold aggregated that sum. In *Dodge v. Emmons*, 34 Kan. 732, a tax-deed reciting a sale in bulk of lands included within two descriptions was not for that reason held void on its face where the descriptions showed that the lands lay together in compact form in a single district. And in *Crisman v. Johnson*, 23 Colo. 264, the fact that in a tax-deed of lots sold in bulk the numbers of the lots were not consecutive was not regarded as showing that the lots were not contiguous. A tax-deed of several non-contiguous parcels sold together in bulk for one sum is void: *Emerson v. Shannon*, 23 Colo. 274; *Byam v. Cook*, 21 Iowa 392; *Hall's Heirs v. Dodge*, 18 Kan. 297; *Cartwright v. McFadden*, 24 Kan. 662. See *Brentano v. Brentano* (Or.), 67 Pac. Rep. 922. A tax-deed attempting to convey several non-contiguous parcels, based on a certificate of sale issued to a county, is invalid on its face: *Weeks v. Merkle*, 6 Okl. 714. A deed containing several distinct descriptions with a granting clause conveying the real property "last herein before described," is on its face invalid as to any tracts other than those included in the last description: *Spicer v. Howe*, 38 Kan. 465. As to tax-deed in Wisconsin, including tracts sold to different

sale was valid.¹ And in Iowa a tax-deed sold for the taxes of several years is valid if the sale was legal for the tax of one year, though illegal for the other years.²

Cases which pass upon particular defects as defeating or not defeating particular deeds are referred to in the margin.³

It is said in a recent case: "The tax-deed is a creature of statute and must be given that meaning and intendment only which the statute directs."⁴

Relation back of deed. When given, the tax-deed relates back to the time of sale for all purposes of substantial justice;⁵ thus, where the original owner of land sold for taxes cuts timber therefrom during the period of redemption, not for the consumption in the customary use of the land, such timber will become, at the expiration of the time to redeem, the property

purchasers, see *Hunt v. Stinson*, 101 Wis. 556.

¹ *Hunt v. Chapin*, 42 Mich. 24.

² *Parker v. Cochran*, 64 Iowa 757.

³ *Jenkins v. McIngree*, 22 Fed. Rep. 148; *Doland v. Mooney*, 72 Cal. 34; *Pearson v. Creed*, 78 Cal. 144; *Greenwood v. Adams*, 80 Cal. 74; *Landreagan v. Peppin*, 86 Cal. 122; *Jalunn v. O'Brien*, 89 Cal. 57; *Rollins v. Woodman*, 117 Cal. 516; *Russ & Sons Co. v. Crichton*, 117 Cal. 695; *Simmons v. McCarthy*, 118 Cal. 622; *Hayes v. Ducasse*, 119 Cal. 682; *Earle v. Simmons*, 94 Ind. 573; *Davis v. Harrington*, 35 Kan. 134; *Harris v. Curran*, 32 Kan. 580; *Heil v. Redden*, 38 Kan. 255; *Sanger v. Rice*, 43 Kan. 580; *Martin v. Garrett*, 49 Kan. 131; *Stafford v. Lauver*, 49 Kan. 690; *Douglas v. Lowell*, 60 Kan. 239; *Renshaw v. Imboden*, 31 La. An. 661; *Madland v. Benland*, 24 Minn. 372; *Skinner v. Williams*, 85 Mo. 489; *Hill v. Atterbury*, 88 Mo. 114; *Jones v. Driskell*, 94 Mo. 190; *Langley v. Batchelder*, 69 N. H. 565; *Coleman v. Shattuck*, 62 N. Y. 348; *Woodward v. Sloan*, 27 Ohio St. 592; *Coxe v. Deringer*, 82 Pa. St. 236; *Shell v. Duncan*, 31 S. C. 547; *Wing v. Hall*, 47 Vt. 182, 215;

Cutler v. Hurlbut, 29 Wis. 152; *Lybrand v. Haney*, 31 Wis. 230; *Austin v. Holt*, 32 Wis. 478; *Marshall v. Benson*, 48 Wis. 558; *Hunt v. Stinson*, 101 Wis. 556. The fact that in a tax-deed the dollar-mark is omitted in the tabular statement of the amount found by the judgment to be due on each tract does not vitiate the deed, where the aggregate amount in dollars and cents is written at length in the deed and judgment: *Coombs v. Crabtree*, 105 Mo. 292.

⁴ *Kepley v. Fouke*, 187 Ill. 162.

⁵ *Connecticut Mut. L. Ins. Co. v. Bulte*, 45 Mich. 113. The tax-deed does not relate back to the sale where redemption is allowed afterwards: *Donohoe v. Veal*, 19 Mo. 331. See *Hemingway v. Drew*, 47 Mich. 554. A tax-deed does not relate back to the time when the grantee might have obtained it, but only to such time as he filed his affidavit entitling him thereto: *Palmer v. Frank*, 169 Ill. 90. A tax-deed will not relate back so as to constitute color of title existing before it was executed: *Harrell v. Enterprise Sav. Bank*, 183 Ill. 538.

of the holder of the tax-deed if redemption is not effected.¹ But the fiction of relation will not be allowed to work a wrong.²

The tax-deed as evidence. It has been shown that, according to the principles of the common law, the purchaser at a tax-sale, when he attempts to enforce rights under his purchase, is under the necessity of taking upon himself the burden of showing that the purchase was made pursuant to law. To do this he must show the substantial regularity of all the proceedings. The deed of conveyance would not stand for this evidence. It would prove its own execution; nothing more. The power to execute it must be shown before the deed itself could have any force; for no officer can make out his own jurisdiction to act by the mere fact of acting. In all administrative proceedings the facts upon which jurisdiction depends must always be shown by him who claims anything under its exercise. This principle is undisputed. It leads us inevitably to this conclusion: that whoever claims lands under a sale for delinquent taxes must take upon himself the burden of proving that taxes were duly assessed, which were a charge upon the land, and that the successive steps were taken which led to a lawful sale therefor, at which he or some one under whom he claims became the purchaser.³ And this common-law rule of evidence must be applied

¹ Nicklase v. Morrison, 56 Ark. 553.

² Connecticut Mut. L. Ins. Co. v. Bulte, 45 Mich. 113.

³ Stead's Lessee v. Course, 4 Cranch 403; Williams v. Peyton, 4 Wheat. 77; McClung v. Ross, 5 Wheat. 116; Thatcher v. Powell, 6 Wheat. 119; Ronkendorff v. Taylor, 4 Pet. 349; Moore v. Brown, 11 How. 414; Parker v. Overman, 18 How. 137; Clarke v. Strickland, 2 Curt. C. C. 439; Minor v. McLean, 4 McLean 138; Moore v. Brown, 4 McLean 211; Mahew v. Davis, 4 McLean 213; Minthorn v. Smith, 3 Sawy. 142; Pope v. Headen, 5 Ala. 433; Lyons v. Hunt, 11 Ala. 295; Boykin v. Smith, 65 Ala. 294; McKinnon v. Mixon, 128 Ala. 612; Blakeney v. Ferguson, 8 Ark. 272; Bucknall v. Story, 36 Cal. 67; Emeric v. Alvarado, 90 Cal. 444; Harkness v.

Board of Public Works, 1 MacA. 121; Keefe v. Bramhall, 3 Mackey 551; Johnson v. Phillips, 89 Ga. 286; McLeod v. Brooks Lumber Co., 98 Ga. 253; Chicago v. Wright, 32 Ill. 192; Scammon v. Chicago, 40 Ill. 146; Williams v. State, 8 Blackf. 36; Doe v. Flagler, 1 Ind. 542; Doe v. Sweetzer, 2 Ind. 649; Barnes v. Doe, 4 Ind. 132; Kyle v. Malin, 8 Ind. 34; Brown v. Swander, 121 Ind. 164; Fitch v. Casey, 2 Greene (Iowa) 300; Whipple v. Earick, 93 Ky. 121; Rice v. West (Ky.), 42 S. W. Rep. 116; Carlisle v. Cassady (Ky.), 46 S. W. Rep. 490; Brown v. Veazie, 25 Me. 359; Payson v. Hall, 30 Me. 319; Loomis v. Pingree, 43 Me. 299; Lovejoy v. Lunt, 48 Me. 377; Williamsburgh v. Lord, 51 Me. 599; French v. Patterson, 61 Me. 203; Phillips v. Sherman, 61 Me. 548;

to tax conveyances of all descriptions, where the statute has failed to prescribe any other.¹

The difficulty of making the complete showing in these cases has been thought to be so great as to render some modification of the rule reasonable, and statutes have from time to time

Rackliff v. Look, 69 Me. 516; Libby v. Mayberry, 80 Me. 137; Ladd v. Dickey, 84 Me. 190; Skowhegan Sav. Bank v. Parsons, 86 Me. 514; Maddocks v. Stevens, 89 Me. 336; Bennett v. Davis, 90 Me. 102; Polk v. Rose, 25 Md. 153; Beatty v. Mason, 30 Md. 409; Dyer v. Boswell, 39 Md. 465; Burke v. Burke, 170 Mass. 499; Doe v. Insurance Co., 8 S. & M. 197; Natchez v. Minor, 10 S. & M. 246; National Bank v. Louisville, N. O. & T. R. Co., 72 Miss. 447; Sunflower L. & M. Co. v. Watts, 77 Miss. 56; Cahoon v. Coe, 57 N. H. 556; Atkins v. Kinman, 20 Wend. 241; Doughty v. Hope, 3 Denio 595; Waldron v. McComb, 1 Hill 107; Sharp v. Spier, 4 Hill 76; Tallman v. White, 2 N. Y. 66; Bennett v. Buffalo, 17 N. Y. 383; Cruger v. Dougherty, 43 N. Y. 107; Doe v. Roe, 2 Hawks 17; Avery v. Rose, 4 Dev. 549; Love v. Gates, 4 Dev. & Bat. 353; Garrett v. White, 3 Ired. Eq. 131; Jordan v. Rouse, 1 Jones L. 119; McMillan v. Robbins, 5 Ohio 31; Kellogg v. McLaughlin, 8 Ohio 114; Bays v. Trulson, 25 Or. 109; Shearer v. Woodburn, 10 Pa. St. 511; McReynolds v. Longenberger, 57 Pa. St. 113; Rule v. Parker, Cooke 278; Hamilton v. Burum, 3 Yerg. 355; Calder v. Ramsey, 66 Tex. 218; Clayton v. Rehm, 67 Tex. 52; Telfener v. Dillard, 70 Tex. 139; Bartley's Heirs v. Harris, 70 Tex. 181; Earle v. Henrietta, 91 Tex. 301; Asper v. Moon (Utah), 67 Pac. Rep. 409; Richardson v. Dorr, 5 Vt. 9; Yancey v. Hopkins, 1 Munf. 419; Christy v. Minor, 4 Munf. 431; Nalle v. Fenwick, 4 Rand. 585; Allen v. Smith, 1 Leigh 231; Chapman v. Doe, 2 Leigh 329. If one who claims title to cer-

tain land under tax-deeds has never had the actual or constructive possession of it, and produces no evidence as to the proceedings in regard to the tax-sales prior to the execution of the deeds, there is no presumption in favor of the regularity of such deeds as against a person in actual adverse possession under claim and color of title: Downer v. Tarbell, 61 Vt. 530. Recitals in tax-deeds are not evidence of the facts recited unless they are made so by statute: Johnson v. Phillips, 89 Ga. 286; Nason v. Ricker, 63 Me. 381; Maddocks v. Stevens, 89 Me. 336. A tax-deed held admissible to support a plea of statute of limitations and claim for improvements made in good faith, without proof of the levy of the tax and the usual prerequisites to a sale for taxes: Schleicher v. Gatlin, 85 Tex. 270.

¹ Or, it may be added, prescribed it imperfectly: Upton v. Kennedy, 36 Mich. 215. Where the statute does not attempt to make the tax-deed *prima facie* evidence of the regularity of all the proceedings, and of title in the purchaser, but seeks unconstitutionally to make it conclusive evidence, the common-law rule applies, and the burden is cast upon the grantee to show a valid decree and sale thereunder: Dawson v. Peter, 119 Mich. 274; Taylor v. Deveaux, 100 Mich. 581. Where, on account of irregularities connected with a tax-sale, the deed is set aside, such deed no longer possesses any evidential force, and in order to show that the tax for which the sale was made, or any subsequent tax, was lawful, the party alleging the fact must show, by

been made in that direction. The early statutes were probably not as comprehensive in their terms as their authors intended; at least, as construed by the courts, they did not change to any considerable extent the former rule. Thus, a statute which declared that the deed should be evidence of the regularity of the sale was held to prove *only* the regularity of the proceedings at the sale, leaving the purchaser still under the necessity of showing the regularity of the prior proceedings.¹ The decisions made the statutes of little or no moment, as whether the proceedings at the sale were regular or not was commonly proved with little difficulty.² Later statutes have gone further; some of them making the tax-deed *prima facie* evidence of the facts recited in it; others making it *prima facie* evidence of the regularity of all the proceedings to and including the sale,

common-law proof, that the steps essential to a valid tax have been taken: *O'Neil v. Tyler*, 3 N. D. 47. When the holder of a tax-deed sues to quiet his title, or, in case of the failure of his title, to foreclose his lien for taxes paid, the tax-deed, if void on its face, is inadmissible in evidence for any purpose: *Merriam v. Dovey*, 25 Neb. 618. Though a statute declares that a tax-deed made under its provisions, and regular on its face, is *prima facie* evidence of title, yet one defending in ejectment under a deed not regular on its face has the burden of showing that all the requirements of the law in relation thereto were complied with: *Taylor v. Winona & St. P. R. Co.*, 45 Minn. 66. Where a tax-deed is not *prima facie* evidence of title, the destruction of the tax-records will not raise a presumption that will support it: *Rhodes v. Gunn*, 35 Ohio St. 387. Neither will lapse of time raise such a presumption: *Hilton v. Bender*, 69 N. Y. 75.

¹ *Wilson v. Lemon*, 23 Ind. 433; *Rowland v. Doty*, Har. Ch. (Mich.) 3; *Scott v. Young Men's Soc.*, 1 Doug. (Mich.) 119; *Latimer v. Lovett*, 2 Doug. (Mich.) 204; *Ives v. Kimball*, 1 Mich. 308; *Striker v. Kelly*, 2

Denio 323; *Doughty v. Hope*, 3 *Denio* 594; *Tallman v. White*, 2 N. Y. 66; *Beekman v. Bigham*, 5 N. Y. 366; *Westbrook v. Willey*, 47 N. Y. 457; *Yenda v. Wheeler*, 9 Tex. 408. A provision of law that the purchaser in a municipal tax-lease "shall hold the land against the owner and all persons claiming it" does not make the lease *prima facie* evidence of the regularity of the proceedings: *Hilton v. Bender*, 69 N. Y. 75. A statute which makes the deed evidence of a title in fee-simple in the owner is held to make it evidence only of such a title after the right to give the deed has been shown by the proof of anterior proceedings that support it. This is recognized in many of the cases above cited. See, also, *Merrick v. Hutt*, 15 Ark. 331. A declaration in a tax-law that the tax-deed should be "good and effectual both at law and in equity" gives no special sanction to the conveyance beyond the general principles of law. The purchaser must show that all prerequisites have been complied with: *Hadley v. Tankersley*, 8 Tex. 12.

² See *Robson v. Osborn*, 13 Tex. 298.

and of title in the purchaser, and still others undertaking to make it conclusive evidence of some or perhaps of all the proceedings.

Where the deed is evidence only of the facts recited, if essential facts are omitted they must be proved before the deed will become evidence of title in the grantee.¹ And if the deed is made presumptive evidence of certain matters only, the recitals it contains are not, except as to those matters, evidence, and the burden is on the purchaser to prove that such recitals are true.²

If the tax-deed is made *prima facie* evidence of the regularity of all the proceedings, and of title in the purchaser, this effects an entire change in the burden of proof, relieving the purchaser thereof and casting it upon the party who would contest the sale. The purchaser is no longer under the necessity of showing the correctness of the proceedings, but the contestant must point out in what particular he claims them to be incorrect. The power to enact such laws has been denied in argument, but the decisions fully sustain them.³ These decisions

¹ Lawrence v. Zimpleman, 37 Ark. 643.

² Stoudenmire v. Brown, 57 Ala. 491. A tax-deed in Louisiana is *prima facie* evidence of a valid sale, but in the absence of recitals in the deed and of proof *aliunde* of the appointment of a curator, and the service of notice on him, the sale of the land of a non-resident owner is void: Rapp v. Lowry, 30 La. An. 1272. A statutory provision that the tax-deed is presumptive evidence that notices had been served and due publication had before the expiration of time for redemption refers only to the notices required to be given by the sheriff, and not to the notice which the purchaser is required to serve on the person in possession, etc.: King v. Cooper, 128 N. C. 347. See, to the same effect, Gage v. Bani, 141 U. S. 344; Kepley v. Fouke, 187 Ill. 162; Hennessey v. Volkening, 30 Abb. N. C. 100, 22 N. Y. Supp. 528. In Mississippi a conveyance from the

state has been held to be no evidence of a tax-title without a showing that there had been a sale of the land to the state for taxes: Bennett v. Chaffee, 69 Miss. 279. In North Carolina it has been decided that a tax-deed to the state, though treated as ancient and as color of title, is ineffectual as a conveyance and as evidence of title, without proof that the state, or some agency under it, had possession of the land: Eastern Carolina Land, etc. Co. v. State Board, 101 N. C. 35. Deed of "forfeited lands" in Minnesota held not *prima facie* evidence of title without preliminary proof *aliunde* of authority from the state auditor to the county auditor to make the sale recited in the deed: Bonham v. Weymouth, 39 Minn. 92.

³ Pillow v. Roberts, 13 How. 472; Williams v. Kirtland, 13 Wall. 306, 310; De Treville v. Smalls, 98 U. S. 517; Kelley v. Sanders, 99 U. S. 441; Sperry v. McKinley, 99 U. S. 496; Marx v. Hanthorn, 148 U. S. 172;

are that the statutes take away no substantial rights; they only regulate the order of proceeding in the legal tribunals, in exhibiting the evidence of substantial rights,¹ and they rest on the solid foundation of the supreme authority of the legislature over the whole subject of evidence; an authority which is only exceeded when the legislature, going beyond all bounds, undertakes, under the pretense of prescribing rules of evidence, to divest rights without opportunity for a hearing. In the marginal note are collected many cases bearing upon tax-deeds which have by statute been made *prima facie* evidence, or which contain recitals that the statute requires to be taken as true until the contrary is shown.² Reference is also made in

Steedman v. Planters' Bank, 7 Ark. 424; Briscoe v. Coulter, 18 Ark. 423; Butts v. Francis, 4 Conn. 424; Sams v. King, 18 Fla. 557; Paul v. Fries, 18 Fla. 573; Allen v. Armstrong, 16 Iowa 508; Adams v. Beale, 19 Iowa 61; Eldridge v. Kurhl, 27 Iowa 160; Clark v. Connor, 28 Iowa 311, 315; Hurley v. Woodruff, 30 Iowa 260; Genther v. Fuller, 36 Iowa 604; Sprague v. Pitt, McCahon 212; Freeman v. Thayer, 33 Me. 76; Orono v. Veazie, 57 Me. 517; Sibley v. Smith, 2 Mich. 486; Lacey v. Davis, 4 Mich. 140; Amberg v. Rogers, 9 Mich. 332; Groesbeck v. Seeley, 13 Mich. 329; Wright v. Dunham, 13 Mich. 414; Dawson v. Peter, 119 Mich. 274; Ray v. Murdock, 36 Miss. 692; Belcher v. Mhoon, 47 Miss. 613; Griffin v. Dogan, 48 Miss. 11; Bell v. Coats, 54 Miss. 538; Viriden v. Bowers, 55 Miss. 1; Abbott v. Lindenbower, 42 Mo. 162, 46 Mo. 291; Cook v. Hackleman, 45 Mo. 317; Larson v. Dickey, 39 Neb. 463; Hand v. Ballou, 12 N. Y. 541; Forbes v. Halsey, 26 N. Y. 53; Johnson v. Elwood, 53 N. Y. 435; White v. Wheeler, 51 Hun 573; Moore v. Byrd, 118 N. C. 688; Peebles v. Taylor, 118 N. C. 688; Stanberg v. Sillon, 13 Ohio St. 571; Turney v. Yeoman, 14 Ohio 207; Hoffman v. Bell, 61 Pa. St. 444; Smith v. Chapman, 10 Grat. 445; Howe v. Barto, 12 Wash. 627; State v. Whit-

tlesey, 17 Wash. 447; Delaplaine v. Cook, 7 Wis. 44; Lumsden v. Cross, 10 Wis. 282; Stewart v. McSweeney, 14 Wis. 468; Whitney v. Marshall, 17 Wis. 174; Smith v. Cleveland, 17 Wis. 556.

¹A mere change in the order of proof in these matters is within the power of the legislature. See Gage v. Caraher, 125 Ill. 447, where a statutory provision that no tax-deed based upon any proceedings, the records of which have been destroyed, shall be received as *prima facie* evidence of the regularity of such proceedings was held applicable to cases where the statute making tax-deeds *prima facie* evidence of the regularity of precedent steps was in force at the time of making the deeds; this was held not to be an impairment of the obligation of contracts.

²Little v. Herndon, 10 Wall. 26; Gage v. Kaufman, 133 U. S. 471; Shearer v. Corbin, 3 Fed. Rep. 705; Johnston v. Sutton, 45 Fed. Rep. 296; Williams v. Athens Lumber Co., 62 Fed. Rep. 558; Stoudenmire v. Brown, 57 Ala. 481; Johns v. Johns, 93 Ala. 239; Thweatt v. Black, 30 Ark. 732; Scott v. Woodruff, 49 Ark. 266; Taylor v. Van Meter, 53 Ark. 204; Boehm v. Porter, 54 Ark. 665; Alexander v. Bridgford, 59 Ark. 195; Wetherbee v. Dunn, 32 Cal. 106; Rol-

the margin to decisions upon the evidence necessary to overcome the presumption of regularity which the tax-deed affords, and the presumptions which will be made in its support.¹ It has been held that a statute which has the effect of raising a

lins v. Wright, 98 Cal. 395; Miller v. Miller, 96 Cal. 376; United States Sec. & Bond Co. v. Wolfe (Colo.), 60 Pac. Rep. 637; Mundee v. Freeman, 23 Fla. 529; Livingston v. Hudson, 85 Ga. 835; Hilton v. Singletary, 107 Ga. 821; Co-operative S. & L. Assoc. v. Green (Idaho), 51 Pac. Rep. 770; Elston v. Kennicott, 46 Ill. 187; Green v. Lightburn, 93 Ill. 248; Eagan v. Connolly, 107 Ill. 458; Ransom v. Henderson, 114 Ill. 528; Gage v. Caraher, 125 Ill. 447; Perry v. Burton, 126 Ill. 599; Pardridge v. Hyde Park, 131 Ill. 537; Gilbreath v. Dilday, 152 Ill. 207; Wine v. Woods, 109 Ind. 291; Scarry v. Lewis, 133 Ind. 96; Burt v. Hasselman, 139 Ind. 196; Richard v. Carrie, 145 Ind. 49; Doren v. Lupton, 154 Ind. 396; Wilson v. Carrico, 155 Ind. 570; Lore v. Welch, 33 Iowa 192; American Exch. Bank v. Crooks, 97 Iowa 244; Hobson v. Dutton, 9 Kan. 477; Smith v. Hobbs, 49 Kan. 800; Giddens v. Mobley, 37 La. An. 417; Stroebel v. Seeger, 49 La. An. 36; Cucullu v. Brakenridge Lumber Co., 49 La. An. 445; Tensas Delta Lumber Co. v. Sholars, 105 La. 357; Lochte v. Austin, 69 Miss. 271; Powell v. Greenstreet, 95 Mo. 13; Rathbone v. Hooney, 58 N. Y. 463; Lamb v. Connolly, 122 N. Y. 531; Brown v. Allen, 10 N. Y. Supp. 714; Lee v. Jeddo Coal Co., 84 Pa. St. 74; Shell v. Duncan, 31 S. C. 547; Bull v. Kirk, 37 S. C. 395; Ward v. Huggins, 7 Wash. 617; Bracka v. Fish (Wash.), 63 Pac. Rep. 561; Bemis v. Weege, 67 Wis. 435; Lombard v. White, 76 Wis. 445; Hotson v. Wetherby, 88 Wis. 324. A tax-deed held not *prima facie* evidence of title where it failed to show that the sale was for taxes delinquent: Sheehy v. Hinds, 27

Minn. 259. As to the effect as evidence of a deed given on a sale for federal taxes, see Brown v. Goodwin, 75 N. Y. 409, citing Marsh v. Brooklyn, 59 N. Y. 280. A statute declaring that tax-deeds shall be *prima facie* evidence of certain facts essential to their validity does not dispense with the necessity of alleging such facts in a plea setting up a tax-deed: Gage v. Harbert, 145 Ill. 530.

¹State Auditor v. Jackson Co., 65 Ala. 142; Scott v. Mills, 49 Ark. 266; Parr v. Matthews, 50 Ark. 390; Hall v. Caps, 107 Cal. 513; Waddingham v. Dickson, 17 Colo. 223; Duggan v. McCullough, 27 Colo. 43; Mundee v. Freeman, 23 Fla. 529; Shackelford v. Hooper, 65 Ga. 366; Taylor v. Wright, 121 Ill. 455; Fuller v. Armstrong, 53 Iowa 683; Lathrop v. Irwin, 96 Iowa 713; Barrett v. Kevane, 100 Iowa 653; Font v. Gulf State L. & I. Co., 47 La. An. 272; Silsbee v. Stockle, 44 Mich. 561; Boyce v. Sebring, 66 Mich. 210; National Bank v. Louisville, N. O. & T. R. Co., 72 Miss. 447; Mixon v. Clevenger, 74 Miss. 67; Woodbridge v. State, 43 N. J. L. 362; Colman v. Shattuck, 62 N. Y. 348; Parsons v. Parker, 80 Hun 281; Brentano v. Brentano (Or.), 67 Pac. Rep. 922; Wilson v. Cantrell, 40 S. C. 114; Hurd v. Brisner, 3 Wash. 1; Baer v. Choir, 7 Wash. 631; Wood v. Meyer, 36 Wis. 308; Hiles v. Cate, 75 Wis. 91. In Iowa, a tax-deed being *prima facie* evidence of the regularity of all proceedings prior to its execution, it is presumed, in the absence of a showing to the contrary, that the notice of the expiration of the time to redeem was served upon the person in whose name the land was taxed: Soukup

prima facie presumption in favor of tax-deeds does not apply to a deed bearing upon its face evidence that it is invalid.¹ And if a deed on its face shows an illegal sale, there can be no recovery under it, notwithstanding the statute undertakes to preclude any defense against a tax-deed until it is first shown the taxes were paid or tendered.²

That a tax-deed can be made conclusive evidence of title in the grantee we think is more than doubtful; the attempt is a plain violation of the great principle of Magna Charta which has been incorporated in our bills of rights, and if successful would in many cases deprive the citizen of his property by proceedings absolutely without warrant of law or of justice; it is not in the power of any American legislature to deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity.

v. Union Inv. Co., 84 Iowa 448. Where the tax-deed is evidence of regularity the counter evidence should be such as to exclude any reasonable presumption of regularity: Sams v. King, 18 Fla. 557. Compare Bidleman v. Brooks, 28 Cal. 72; Rayburn v. Kuhl, 10 Iowa 92; Lacey v. Davis, 4 Mich. 140; Wright v. Dunham, 13 Mich. 414; Case v. Dean, 16 Mich. 12; Hall v. Kellogg, 16 Mich. 139; Ewart v. Davis, 76 Mo. 129; Wood v. Meyer, 36 Wis. 308. A tax-deed *prima facie* valid is not shown to be invalid without a showing of facts which are necessarily inconsistent with legality: Upton v. Kennedy, 36 Mich. 215; Wood v. Meyer, 36 Wis. 308. Where evidence is produced to rebut the *prima facie* character of a tax-deed, the party holding under it has the burden of sustaining it by evidence: Tensas Delta Land Co. v. Sholars, 105 La. 357. But even though the statute making a tax-deed *prima facie* evidence of the regularity of the proceedings casts on the person attacking the deed the burden of proof, yet the sheriff's return showing that two separate parcels of

land were sold *en masse* is enough to vitiate the deed: Brentano v. Brentano (Or.), 67 Pac. Rep. 922. As to attacking, in Louisiana, a deed *prima facie* valid, see Delarodie v. Hillen, 28 La. An. 537; Telle v. Fish, 34 La. An. 1243; Gerac v. Guilbeau, 36 La. An. 843; Pickett v. Southern Athletic Club, 47 La. An. 1605; Welsch v. Augusti, 52 La. An. 1949. Such a deed is defeated in that state by showing that the land stood of record in the owner's name and was assessed in another's: Lague v. Boagni, 32 La. An. 912; Guidry v. Broussard, 32 La. An. 924; Font v. Gulf State L. & I. Co., 47 La. An. 272. Or by showing that while the deed purported to convey the interest of a living person, the taxpayer had in fact been dead many years, and that neither his successor nor his heirs were represented in the sale: Jackson v. Wren, 36 La. An. 315.

¹ Ball v. Busch, 64 Mich. 336.

² Allen v. Morse, 72 Me. 502; Wiggin v. Temple, 73 Me. 380. See, for the same principle, Cooke v. Pennington, 15 S. C. 185.

It cannot, therefore, make the tax-deed conclusive evidence of the holder's title to the land, or of the jurisdictional facts which would make out title.¹ Thus, notwithstanding a statute undertakes to make the deed conclusive evidence except as against

¹ *Marx v. Hanthorn*, 148 U. S. 172; *Kelly v. Herrall*, 20 Fed. Rep. 364, 368; *Marx v. Hanthorn*, 30 Fed. Rep. 579; *Martin v. Barbour*, 34 Fed. Rep. 701; *Tracy v. Reed*, 38 Fed. Rep. 69; *Bannon v. Burns*, 39 Fed. Rep. 892; *Davis v. Minge*, 56 Ala. 121; *Oliver v. Robinson*, 58 Ala. 46; *Cairo, etc. R. Co. v. Parks*, 32 Ark. 131; *Radcliffe v. Scruggs*, 46 Ark. 96; *Townsend v. Martin*, 55 Ark. 192; *Cooper v. Freeman Lumber Co.*, 61 Ark. 36; *Ramish v. Hartwell*, 126 Cal. 443; *Wambole v. Foote*, 2 Dak. 1; *Dickerson v. Acosta*, 15 Fla. 614; *Maguiar v. Henry*, 84 Ky. 1; *Baumgardner v. Fowler*, 82 Md. 631; *Taylor v. Deveau*, 100 Mich. 581; *McKinnon v. Meston*, 104 Mich. 642; *Dawson v. Peter*, 119 Mich. 274; *Roth v. Gabbert*, 123 Mo. 21, 29; *Larson v. Dickey*, 39 Neb. 463; *Roberts v. First Nat. Bank*, 8 N. D. 504; *Dever v. Cornwell (N. D.)*, 86 N. W. 227; *Weeks v. Merkle*, 6 Okl. 714; *Wilson v. Wook (Okl.)*, 61 Pac. Rep. 1045; *Strode v. Washer*, 17 Or. 50; *Simpson v. Meyers*, 197 Pa. St. 522; *Salmer v. Lathrop*, 10 S. D. 216; *Mather v. Darst (S. D.)*, 82 N. W. Rep. 407; *State v. Dugan*, 105 Tenn. 245; *Virginia Coal Co. v. Thomas*, 97 Va. 527. A statute making a tax-deed conclusive evidence of the regularity and validity of the prior proceedings in an action by the owner to recover possession from the grantee in such deed is constitutional only so far as it does not preclude inquiry as to whether the prerequisites of a valid sale necessary to vest a title have been complied with: *Kelley v. Herrall*, 20 Fed. Rep. 364, 368. It is beyond the power of the legislature to cut off, other than by statute of limitations, the right to show that fundamental defects existed in the tax proceedings under which the land was forfeited: *Townsend v. Martin*, 55 Ark. 192. The legislature cannot deny or cut off a meritorious defense against the purchaser at a tax-sale: *Townsend v. Martin*, 55 Ark. 192; *Cooper v. Freeman Lumber Co.*, 61 Ark. 36. A statute providing that a tax-deed on a judicial sale for taxes "shall convey an absolute title to the land sold, and be conclusive evidence of title in fee in the grantee," applies only when the right to give the deed has been shown by proof of a valid decree: *Taylor v. Deveau*, 100 Mich. 581; *McKinnon v. Meston*, 104 Mich. 642. It is beyond legislative power to transfer title to land by declaring that void deeds shall be valid conveyances of title: *Dever v. Cornwell (N. D.)*, 86 N. W. Rep. 227. It is said in general terms by the supreme court of Iowa that on any jurisdictional question the deed cannot be made conclusive: see *Martin v. Cole*, 38 Iowa 141. It is manifest, however, that this term "jurisdictional" is not employed in the same sense here as it often is in tax-cases—a sense that makes each necessary step a jurisdictional requisite in the next; for in Iowa some of the most important proceedings are held to be established conclusively by the deed. Thus, statutes in that state are sustained which make tax-deeds conclusive evidence of regularity in the listing and assessment, and that the property was regularly advertised and sold: *Allen v. Armstrong*, 16 Iowa 508; *McReady v. Sexton*, 29 Iowa 356; *Rima v. Cowan*, 31 Iowa 125; *Clark v. Thompson*, 37 Iowa 536; *Madson v. Sexton*, 37 Iowa 562; *Smith*

actual fraud or prepayment, it may be shown that the land was exempt from taxation;¹ a statute providing that a tax-deed shall be conclusive evidence of the regularity of all prior proceedings cannot cure the failure to complete the tax-roll;² a deed based upon a void assessment cannot be made valid by any recitals which it contains;³ the legislature has not power

v. Easton, 37 Iowa 584; Easton v. Perry, 37 Iowa 681; Robinson v. First Nat. Bank, 48 Iowa 354; Bullis v. Marsh, 56 Iowa 747. An Oregon statute making a tax-deed good in certain cases was held not to extend to a case where the person taking the deed had no right to take it: Minter v. Durham, 13 Or. 470. Where the statute provides that the tax-deed shall be conclusive evidence of the truth of all the facts recited therein, and shall vest in the grantee an absolute title in fee-simple, it vests such an estate in case only that the statute has been complied with substantially; and every fact not recited in the deed, necessary to make out a valid sale, must be proved by one who claims thereunder: Steeple v. Downing, 60 Ind. 478; Langohr v. Smith, 81 Ind. 495; Farrar v. Clark, 85 Ind. 449; Keeper v. Force, 86 Ind. 81. In Joslyn v. Rockwell, 128 N. Y. 334, it was held that a statute making the tax-deed "conclusive evidence," after a certain time, that the sale of the land, all proceedings prior thereto, and all notices required by law to be given previous to the expiration of two years allowed by law to redeem, were regular, and regularly given, published, and served according to the provisions of the act, and all laws in any manner relating thereto, does not make such deed conclusive evidence of a complete title, but leaves open the right to assail the proceedings for any jurisdictional defect. In Lufkin v. Galveston, 73 Tex. 340, it was decided that a statute declaring a tax-deed to be conclusive that the land was properly

advertised for sale, and was sold for taxes as therein stated, that the grantee was the purchaser, and that the sale was conducted in the manner prescribed by law, and further declaring that a person claiming adversely to the deed should prove either that the land was not subject to taxation or that the taxes had been paid, or that the land had never been listed and assessed, or had been redeemed, etc., does not preclude inquiry into the validity of the taxes.

¹ Quivey v. Lawrence, 1 Idaho 313. A tax-deed of lands exempt from taxation is void. Whether the right of exemption has been forfeited cannot be considered in a suit between individuals: Mackall v. Canal Co., 94 U. S. 304.

² Ne-Ha-Sa-Ne Park Assoc. v. Lloyd, 7 App. Div. (N. Y.) 359, 40 N. Y. Supp. 58.

³ Sheets v. Paine (N. D.), 86 N. W. Rep. 117. Even under a statute making a tax-deed conclusive evidence of the regularity of an assessment, evidence that an assessment was void because the property was not owned by the defendants, and because the value of all the property was fixed at a gross sum, was wrongly excluded in an action to determine the right to realty claimed under a tax-deed. Strode v. Washer, 17 Or. 50. Although the statute provides that a tax-deed shall be conclusive evidence that the property was assessed, the taxes levied, the property advertised, and adjudicated according to law, and that all prerequisites were complied with, the owner may show that there was in fact no as-

to declare the tax-deed conclusive evidence of notice to the owners of the sale of property for delinquent taxes;¹ the deed cannot be made such conclusive evidence of title in fee as to prevent showing that judicial proceedings for sale were void for failure to secure jurisdiction of the owner's person by service of subpoena as required by statute;² under a statute making a tax-deed conclusive evidence of regularity save as to certain specified matters, it may be shown that the sale was made after the warrant had expired;³ it is not competent to make a tax-deed conclusive evidence that a sale which was in fact private, fraudulent, and illegal, was public and legal,⁴ or that the description of the land sold was accurate;⁵ the tax-deed cannot be made conclusive evidence that the grantee named in it was

assessment: *In re Lake*, 40 La. An. 142. If an assessment never was approved or acted upon by the supervisors, a tax-title based thereon must fail, notwithstanding the statute that no title shall be invalidated except on proof of payment or tender of the legal tax: *Davis v. Vanarsdale*, 59 Miss. 367. Nor does that statute preclude such title's being attacked on the ground that the assessment roll in the collector's hands was not properly certified by the clerk: *Gibbs v. Dortch*, 62 Miss. 671. It is not competent in Iowa to make the tax-deed conclusive evidence of an assessment: *Immegart v. Gorgas*, 41 Iowa 439; *Phelps v. Meade*, 41 Iowa 470; *Nichols v. McGlathery*, 43 Iowa 189; *Easton v. Savery*, 44 Iowa 654.

¹ *Marx v. Hanthorn*, 148 U. S. 172. A statute which provides that a tax-deed shall be conclusive evidence that the property was duly advertised for sale is void in so far as it seeks to validate a sale without due notice: *Roth v. Gabbert*, 123 Mo. 21. A statute enacting, in substance, that a sale of land for taxes shall be impervious to attack for any cause whatever after the lapse of two years does not exclude the defense that notice of the sale was not pub-

lished for the full time prescribed by the statute: *Townsend v. Martin*, 55 Ark. 192. Where the notice of sale is substantially insufficient for any reason, it matters not that the statute declares the deed shall be conclusive and shall convey title; such a statute, if upheld, would operate to transfer property without due process of law: *Dever v. Cornwell* (N. D.), 86 N. W. Rep. 227. In *Urquhart v. Wescott*, 65 Wis. 135, and *Ramsey v. Hommel*, 68 Wis. 12, it was held that the limitation of one year prescribed in the Wisconsin statute in favor of tax-deeds, only cures defects "going to the validity of the assessment, and affecting the groundwork of the tax," and does not cure defects in the notice of sale or proof of publication thereof. Mississippi statute held not to prevent the owner of land sold for taxes from suing to set a tax-deed aside on the ground that the tax-collector failed to publish a list of the delinquent land as required by law: *West v. Duncan*, 42 Fed. Rep. 430.

² *Taylor v. Deveau*, 100 Mich. 581.

³ *Kelly v. Herrall*, 20 Fed. Rep. 364.

⁴ *Butler v. Delano*, 42 Iowa 350; *Thompson v. Ware*, 43 Iowa 455.

⁵ *Immegart v. Gorgas*, 41 Iowa 439.

the tax-sale purchaser or his assignee,¹ nor can such a deed, even when founded on a judgment sale, be conclusive against a person who was not a party to the judgment, and who had actually paid the tax;² and, though made conclusive evidence of the regularity of the sale, the tax-deed is not conclusive as to the publication of the statutory notice required to cut off redemption.³

But the legislature may make tax-deeds conclusive evidence of the correct performance of all mere acts of routine, and of acts in which the public rather than the taxpayer was specially concerned; in short, of everything except the essentials.⁴ And

¹ *Larson v. Dickey*, 39 Neb. 463.

² *Mayo v. Haynie*, 50 Cal. 70.

³ *Westbrook v. Willey*, 47 N. Y. 457. In Iowa a deed is not conclusive evidence that the notice of the expiration of the time in which to redeem was given. But where there is proof of notice and a regular deed, the burden is on a party denying the sale's sufficiency: *Wilson v. Crafts*, 56 Iowa 450. See *Reed v. Thompson*, 56 Iowa 455.

⁴ See *Morrill v. Douglass*, 17 Kan. 291; *Larson v. Dickey*, 39 Neb. 463; *Tonawanda v. Price* (N. Y.), 64 N. E. Rep. 191. The legislature may make the tax-deed conclusive evidence of compliance with every requirement which the legislature might, in the original exercise of its discretion, have dispensed with, and may validate retrospectively the proceedings which it might have authorized in advance: *Breaux v. Negrotto*, 43 La. An. 426. The legislature can make recitals in tax-deeds conclusive evidence of due performance of tax proceedings within legislative control, but not of jurisdictional matters: *Roberts v. First Nat. Bank*, 8 N. D. 504. Under a statute making tax-deeds conclusive evidence that "all of the prerequisites of the law were complied with by all of the officers, from the assessment up to and including the execution and registry

of the deed to said purchaser," certain irregularities in the assessment, in not complying with the special requirements of the law under which it was made, will be cured, the assessment having been made by a description sufficient to identify the property, and the owner not having been misled: *In re Douglass*, 41 La. An. 765. And under such a statute, where a part of the taxes for which the land was sold was legally assessed, the sale will not be rendered invalid because a part was incorrectly assessed: *Dibble v. Leppert*, 47 La. An. 792. In Missouri, by the statute of 1872, tax-deeds are conclusive evidence that everything has been done the omission of which would be a mere irregularity, and *prima facie* evidence of all else: see *Raley v. Guinn*, 76 Mo. 263. As to what is a mere irregularity, see *Phelps v. Meade*, 41 Iowa 470. Under statutes in Missouri requiring property to be offered at public sale for taxes on the first Monday of October, unless, for any cause, the sale cannot take place on that day, in which case the sale may be made on the first Monday of November, and providing that the tax-deed shall be conclusive evidence that the property was duly advertised and sold, a deed was not void because made on the fourth day of November, without giving any rea-

by a statute of limitations the tax-deed, even though executed prior to the enactment of such statute, may, after a certain

son why it was made then, except the statement that the property "could not be, and was not, advertised on the first Monday of October:" *Roth v. Gabbert*, 123 Mo. 21. Under the California statute making the tax-collector's deed conclusive evidence of the regularity of all proceedings from the assessment to the execution of the deed, it is immaterial whether the affidavit of publication filed by the tax-collector was signed by him or by the printer of the newspaper as required by law: *Haaren v. High*, 97 Cal. 445. And under the same statute the mistake of a tax-collector in copying an erroneous description of the land sold for taxes into the book kept therefor in his office does not impair the rights of the grantee in the tax-deed: *Klumpke v. Baker* (Cal.), 63 Pac. Rep. 137. But the "proceedings" of which the deed is conclusive evidence are not acts acquired to be done by the purchaser pursuant to acquiring a tax-deed, and such deed is not conclusive evidence that notice to redeem has been served as required by law: *Reed v. Lyon*, 96 Cal. 501. See *Herrick v. Neisz*, 16 Wash. 74. In Mississippi it has been held that the legislature has power to provide that the tax-deed shall not be invalidated except by proof of fraud or mistake in the assessment or sale, or that the taxes were paid: *Griffin v. Dogan*, 48 Miss. 11; *Bell v. Coats*, 54 Miss. 538; *Virden v. Bowers*, 55 Miss. 1. The Mississippi statute setting out the grounds on which a tax-sale may be impeached does not preclude the defense that the sale is void because for taxes levied in aid of the rebellion: *Boyle v. Manion* (Miss.), 22 South. Rep. 947. Under the Arkansas statute if the tax-deed recites that the land sold

was assessed to non-residents, the objection that the land, which was sold as that of non-residents, was assessed to residents, cannot be raised against the deed: *Burgett v. Williford*, 56 Ark. 187. In Iowa, if the deed recites that the land sold was offered separately, this is conclusive: *Chandler v. Keiler*, 44 Iowa 371. Nor, in that state, can the deed be assailed on the ground that the land was bid in by the county treasurer in violation of the statutory provision that sales of land for taxes to any county treasurer or clerk "shall be void:" *Waggoner v. Mann*, 83 Iowa 73. Under the West Virginia statute providing that a tax-deed shall be valid "notwithstanding any irregularity in the proceedings under which the grantee claims title, unless such irregularity appear on the face of the proceedings," parol evidence is not admissible to uphold or invalidate a tax-deed, and it must be determined from the proceedings of record on which the deed is founded, and upon the face of the deed itself, whether the deed is valid: *Williamson v. Russell*, 18 W. Va. 612; *McCallister v. Cottrille*, 24 W. Va. 173; *McClain v. Batton*, 50 W. Va. 121. Contradictory entries on the treasurer's sales book as to whether or not there were adjourned sales are insufficient to impeach the recitals of a treasurer's deed that such adjourned sales were held: *Lee v. Newland*, 164 Pa. St. 360. It seems that in Louisiana a tax-deed cannot be attacked collaterally: *Lannes v. Workingmen's Bank*, 29 La. An. 112; *Jurey v. Allison*, 30 La. An. 1234; *Stille v. Schull*, 41 La. An. 816. In Michigan a tax-deed upon a judicial sale for taxes cannot be attacked collaterally because the lands it covers, being held by the state by

period, be made conclusive evidence.¹ Statutes undertaking to prescribe conclusive rules are not, however, to be extended by construction.²

It is generally held that the holder of a tax-deed is precluded from introducing evidence to contradict its recitals;³ and where a tax-deed is, under the statute, conclusive evidence of the truth of the facts which it recites, if the recitals render it void on its face they nevertheless bind one who claims under it.⁴

virtue of tax-bids, were erroneously included in the petition for sale: *Peninsular Savings Bank v. Ward*, 118 Mich. 87. The deed may, however, be attacked by showing that the decree did not adjudge any sum of money against the land: *Case v. Skinner*, 121 Mich. 206. Or by showing a certificate of error from the auditor-general: *Wood v. Bigelow*, 115 Mich. 123.

¹See *Turner v. New York*, 168 U. S. 90; *Saranac L. etc. Co. v. Comptroller*, 177 U. S. 318; *People v. Turner*, 145 N. Y. 451; *Meigs v. Roberts*, 162 N. Y. 371. After the statute of limitations has run in favor of a tax-deed, irregularities of assessment cannot be considered as affecting the validity of the deed: *Harris v. Curran*, 32 Kan. 580. In Mississippi a statute making a tax-deed conclusive after five years was held valid, at least to the extent of precluding the raising of any question of the officer's failure to give bond: *Powers v. Penny*, 59 Miss. 5. A duly recorded tax-deed of lands in Wisconsin is conclusive evidence of title in the grantee after the lapse of the statutory period of limitations; the land being unoccupied, but constructively in the possession of the grantee in the tax-deed: *Geekie v. Kirby, etc. Co.*, 106 U. S. 379; *Coleman v. Lumber Co.*, 30 Fed. Rep. 317; *Bronson v. St. Croix, etc. Co.*, 44 Minn. 348; *Sprecker v. Wakeley*, 11 Wis. 432; *Hill v. Kricks*, 11 Wis. 442; *Knox v. Cleveland*, 13 Wis. 245; *Stewart v.*

McSweeney, 14 Wis. 468; *Dean v. Earley*, 15 Wis. 100; *Parish v. Eager*, 15 Wis. 532; *Whitney v. Marshall*, 17 Wis. 174; *Smith v. Cleveland*, 17 Wis. 556; *Gunnison v. Hoehne*, 18 Wis. 268; *Lindsay v. Fay*, 28 Wis. 177; *Cutler v. Hurlbut*, 29 Wis. 152; *Lawrence v. Kinney*, 32 Wis. 281; *Austin v. Holt*, 32 Wis. 478; *Oconto County v. Jerard*, 46 Wis. 317; *Milledge v. Coleman*, 47 Wis. 184; *Hiles v. La Flesh*, 59 Wis. 465; *Baldwin v. Ely*, 66 Wis. 171; *Finn v. Wisconsin River L. Co.*, 72 Wis. 546; *Lombard v. White*, 76 Wis. 445; *St. Croix, etc. Lumber Co. v. Ritchie*, 73 Wis. 409.

²*Upton v. Kennedy*, 36 Mich. 215.

³*Hanenkratt v. Hamil (Okl.)*, 61 Pac. Rep. 1050. One who claims under a tax-deed is concluded by its recitals as to the person to whom the land was assessed: *Grimm v. O'Connell*, 54 Cal. 522; *Brady v. Dowden*, 59 Cal. 51. Compare *Hickman v. Kempner*, 35 Ark. 505. A tax-deed held conclusive upon the purchaser claiming under it as to the facts relating to the sale therein stated: *Eustis v. Henrietta*, 91 Tex. 325. The holder of an invalid tax-deed cannot aid it by introducing in evidence the delinquent assessments: *Greenwood v. Adams*, 80 Cal. 74.

⁴See *Salmer v. Lathrop*, 10 S. D. 216, where the tax-deed recited that the sale was made at a time when it could not legally be made, and where two lots required to be assessed separately were sold as one parcel.

One who purchases land at a sale for delinquent taxes while a statute making the tax-deed conclusive evidence of the regularity of the prior proceedings is in force, acquires, it has been held, contract rights which are not to be impaired by a subsequent enactment making the deed *prima facie* evidence only.¹

A tax-deed should have the statutory effect as evidence, even though taken out pending litigation.²

It should be stated here that statutes giving a peculiar effect to conveyances on sales made for taxes, unless in express terms declared applicable to cases of local and special assessments, such as those for paving streets, etc., do not apply to them at all, and the purchaser, under proceedings of that nature, will be compelled to rely upon the common-law rule, and prove regularity.³

Defective title; purchaser's lien. It has been shown that the rule of *caveat emptor* applies to tax-purchases.⁴ The purchaser at a tax-sale will therefore lose what he has paid if his deed is subject to fatal infirmity.⁵ This is the rule unless the statute recognizes an equity in him and provides for it. Sometimes the statute does this by providing that his money be refunded from the public treasury.⁶ Unless legislation in terms

¹ *Marx v. Hanthorn*, 30 Fed. Rep. 579, 148 U. S. 172. See *Strode v. Washer*, 17 Or. 50; *Harris v. Harsch*, 29 Or. 562. Where a tax-sale has been had under a statute declaring a tax-deed to be conclusive evidence of the regularity of all the proceedings up to the execution of the deed, the application to such sale of a subsequent statute requiring the holder of a tax-sale certificate to give notice of his application for a deed at least sixty days prior to the expiration of the time for redemption does not impair the obligation of contracts: *Herrick v. Neisz*, 16 Wash. 74.

² *Hart v. Smith*, 44 Wis. 213.

³ *Bucknall v. Story*, 36 Cal. 67; *Stierlin v. Daley*, 37 Mo. 483; *Sharp v. Speir*, 4 Hill 76; *Glass v. White*, 5 Sneed 475; *Kelly v. Medlin*, 28 Tex. 48. Where a city charter, in providing for assessments for local im-

provements, and for enforcing payment therefor, does not provide that the tax-deed of land sold for non-payment of an assessment shall be *prima facie* evidence of the regularity of the proceedings, title under the tax-deed cannot be established without proof of compliance with every requirement of the charter: *Bays v. Trulson*, 25 Or. 109. Tax-deed for non-payment of special assessments held not *prima facie* evidence of the validity of steps prior to its issue: *Haines v. Young* (Cal.), 64 Pac. Rep. 1079. Under Colorado statutes tax-deed held *prima facie* evidence of the legality of the assessment: *United States Security, etc. Co. v. Wolfe*, 27 Colo. 218.

⁴ *Ante*, p. 920.

⁵ *Ante*, p. 920.

⁶ *Ante*, pp. 921, 922; *Hurd v. Hamill*, 10 Colo. 174; *McWhinney v.*

gives it, the purchaser will have no lien upon the land for the sum paid on the purchase.¹ But in some states this is provided for, either generally or for particular cases.² That there is a limit to the power to give such a lien will be understood on a perusal of the chapter respecting the cure of defects in tax-proceedings. It was there shown that if a tax was merely

Logansport, 132 Ind. 9; *State v. Houston*, 39 La. An. 33; *Flint v. County Com'rs*, 43 Kan. 656; *German-American Bank v. White*, 38 Minn. 471; *Easton v. Hayes*, 38 Minn. 463; *Easton v. Schofield*, 66 Minn. 425; *White v. Brooklyn*, 122 N. Y. 53; *Budge v. Grand Forks*, 1 N. D. 309; *Roberts v. First Nat. Bank*, 8 N. D. 304; *Clapp v. Pinegrove T'p*, 138 Pa. St. 35; *Bidwell v. Tacoma* (Wash.), 67 Pac. Rep. 259; *Grove v. Tacoma* (Wash.), 67 Pac. Rep. 261; *Pier v. Oneida County*, 93 Wis. 463.

¹ *Croskery v. Busch*, 116 Mich. 288; *Blackwell v. First Nat. Bank* (N.M.), 63 Pac. Rep. 43. The latter case holds that the act giving this lien cannot be retroactive. It was held in *Greenwood v. Adams*, 80 Cal. 74, that the holder of an invalid tax-deed could not claim, either in law or in equity, that his purchase vested the state's lien in him.

² In Arkansas, where the statute gave a lien and also made the "proprietor" personally liable, it was held that the proprietor intended was the person on whose default the land was sold, but that the land itself, even in a subsequent owner's hands, was subject to the lien: *Hunt v. Curry*, 37 Ark. 100. Under the Arkansas statute a purchaser at a tax-sale that is invalid for insufficient description of the land sold must show what land was sold to him in order to charge the owner with such taxes; and evidence that the tract sold was only land claimed by such owner in the legal subdivision of which it was a part, is insufficient: *Hershby v. Thompson*, 50 Ark. 484. In Arkan-

sas, where a tax-deed has been declared invalid, the purchaser's cause of action to foreclose his lien for taxes, penalty, and costs begins to run from the time of the adjudication of invalidity, not from the date of sale, or from the expiration of the period of redemption, and the purchaser has not, under the statute, a right of action for reimbursement until the sale at which he bought shall prove invalid, that is, until a court of competent jurisdiction shall pronounce the title bad: *St. Louis, I. M. & S. R. Co. v. Alexander*, 49 Ark. 190. As to the purchaser's right to reimbursement, see, also, *Wright v. Graham*, 42 Ark. 140; *Boehm v. Porter*, 54 Ark. 665; *Gregory v. Bartlett*, 55 Ark. 30. Personal judgment against railroad: *St. Louis, etc. R. Co. v. Alexander*, *supra*. In Indiana a lien is given where the tax-title fails by reason of imperfect description: *Cooper v. Jackson*, 71 Ind. 244; *Sloan v. Sewell*, 81 Ind. 180; *Parker v. Goddard*, 81 Ind. 294; *Peckham v. Millikan*, 99 Ind. 352; *Scott v. Millikan*, 104 Ind. 75; *State v. Casteel*, 110 Ind. 174; *Travelers' Ins. Co. v. Martin*, 131 Ind. 155. But not unless the land is sufficiently identified: *Sharpe v. Dillman*, 77 Ind. 280; *Ford v. Kolb*, 84 Ind. 198. Under the earlier law in Indiana the purchaser had no lien for what he paid at a sale that was void: *Naltner v. Blake*, 56 Ind. 127. But under the present statute in that state a tax-sale, though ineffectual to carry title, will carry to the purchaser the state's lien for taxes, interest, and penalty, in all cases except where

irregular, either in its assessment or levy, or in the steps taken for its enforcement, it was competent for the legislature to provide for a re-assessment in a subsequent year, while if it

the land was not subject to taxation, where the taxes were paid before the sale, and where the description is insufficient to identify the land, or where the sale was unauthorized: *Morrison v. Jacoby*, 114 Ind. 84; *Scarry v. Lewis*, 133 Ind. 96. And, except in the cases specified, a tax-sale, though in violation of mandatory provisions of the statute, vests in the purchaser the title of the state: *Scarry v. Lewis*, *supra*. A person resisting the enforcement of the lien on account of the invalidity of the tax-deed must show the existence of one of said causes to defeat the presumption of the transfer of the lien to the grantee in the deed: *Cole v. Gray*, 139 Ind. 396. It is immaterial to the lien that the tax should have been collected of personalty: *Sloan v. Sewell*, 81 Ind. 180; *Barton v. McWhinney*, 85 Ind. 481. See *McWhinney v. Brinker*, 64 Ind. 360. If the purchaser at a sale for state and county taxes subsequently pays a city tax he may include the latter tax in his lien: *Milikan v. Ham*, 104 Ind. 498; *Jones v. Foley*, 121 Ind. 180. If, where a tract of seventeen acres has been taxed with an entire eighty-acre tract, judgment for its possession is recovered against the tax-sale purchaser, the burden is on him, when seeking to establish a lien for the taxes, to show that there were taxes due upon the particular tract: *Grigsby v. Akin*, 128 Ind. 591. Where part of one's land is sold to pay taxes which, before the sale, were a lien on all of his realty, the lien transferred to the purchaser, if his tax-deed turns out to be invalid, affects the part purchased by him without regard to what property of the owner

the taxes were assessed upon, and a person who takes a mortgage from the original owner upon such such part after, and with constructive notice of, the sale, is not entitled to have such part declared free, and the lien transferred to the part on which the taxes were assessed originally: *Ludlow v. Ludlow*, 109 Ind. 199. As to how the right to reimbursement may be affected by subsequent transfers of title, see *Forey v. Bigelow*, 56 Ind. 381. The lien may be enforced though the land was assessed in the wrong name: *Jenkins v. Rice*, 84 Ind. 342. On the death of the tax-sale purchaser the lien passes to his heir: *Stephenson v. Martin*, 84 Ind. 160. The mere payment of taxes on another person's land does not entitle the party paying to a lien: *Sohn v. Wood*, 75 Ind. 17. But the purchaser of land at an execution sale is not, when he redeems land from sale for taxes, a volunteer who may not enforce a lien for the amount paid: *Harlan v. Jones*, 104 Ind. 167. As to what the purchaser's lien in Indiana may be made to include, see *Flinn v. Parsons*, 60 Ind. 573; *Duke v. Brown*, 65 Ind. 25; *Hasbrook v. Schooley*, 74 Ind. 51; *Logansport v. Case*, 124 Ind. 254; *Stalcup v. Dixon*, 136 Ind. 9. This lien may, in Indiana, be foreclosed in an action to quiet title or to recover possession: *Jenkins v. Rice*, 84 Ind. 342; *Barton v. McWhinney*, 85 Ind. 481; *Jones v. Foley*, 121 Ind. 180. Or the tax-sale purchaser may establish it by his answer in a suit brought against him to quiet title: *Reed v. Earhart*, 88 Ind. 159. As to limitation of suit to enforce the lien in Indiana, see *Brown v. Fodder*, 81 Ind. 491; *Bowen v. Striker*, 87 Ind.

was illegal, the power to re-assess would be wanting. This principle is applicable here, and whenever the state would have power to re-assess, it may more directly, if the land has

317; *Montgomery v. Aydelotte*, 95 Ind. 144. As to the lien in Iowa, the right of the tax-sale purchaser to reimbursement, and his personal remedy against the owner, see *Clausen v. Rayburn*, 14 Iowa 136; *Orr v. Travacier*, 21 Iowa 68; *Light v. West*, 42 Iowa 138; *Kennedy v. Bigelow*, 43 Iowa 74; *Besore v. Dosh*, 43 Iowa 211; *Sexton v. Henderson*, 45 Iowa 160; *Miller v. Corbin*, 46 Iowa 150; *Springer v. Bartle*, 46 Iowa 688; *Thompson v. Savage*, 47 Iowa 522; *Garrigan v. Knight*, 47 Iowa 525; *Sheppard v. Clark*, 58 Iowa 371; *Harber v. Sexton*, 66 Iowa 211; *Barke v. Early*, 72 Iowa 273; *Buck v. Holt*, 74 Iowa 294; *Hunter v. Early*, 75 Iowa 769. No lien in Iowa where the tax-sale is void: *Smith v. Blackiston*, 82 Iowa 240; *Brown v. Poole*, 85 Iowa 412. And in the tax-sale purchaser's suit to quiet title a lien cannot be declared for him if the land sold is insufficiently described: *Hintrager v. Nightingale*, 36 Fed. Rep. 847. In Kansas a defeated tax-title purchaser is entitled to a lien for the taxes paid, interest, costs, etc.; and this, though his deed is void on its face: *Stetson v. Freeman*, 36 Kan. 608; *Jackson v. Challis*, 41 Kan. 247; *Auld v. McAllaster*, 43 Kan. 162; *Polenqueen v. McAllister* (Kan.), 67 Pac. Rep. 826. See *Krutz v. Chandler*, 32 Kan. 659. But the right to a lien for the taxes recited in a tax-deed is barred by the statute of limitations where it appears that the land was not taken possession of under the deed until more than fifteen years after the deed was recorded: *Douglass v. Boyle*, 42 Kan. 392. The lien may be established in an action of ejectment in which the holder of the tax-title fails to recover: *Fairbanks v. Williams*, 24 Kan. 16; *Arn v. Hoppin*, 25 Kan. 707; *Russell v. Hudson*, 28 Kan. 99. But not in a suit to quiet title, the statute giving other relief in that case: *Corbin v. Young*, 24 Kan. 198. See, further, *Saline County Com'rs v. Geis*, 22 Kan. 281; *Lincoln County Com'rs v. Faulkner*, 27 Kan. 164; *Richards v. Wyandotte County Com'rs*, 28 Kan. 326. A defeated tax-deed holder cannot, in Kansas, have a personal judgment against the owner for the taxes paid: *Polenqueen v. McAllister* (Kan.), 67 Pac. Rep. 826. A purchaser at a void tax-sale is entitled in Kentucky to a lien by substitution for the price paid to the extent that it represented taxes which were a lien on the land sold; and where the land was assessed in the name of the holder of the legal title, the owner, when the sale has been declared void because taxes for which no levy had been made were included, cannot deny the purchaser's right to a lien for the full amount of the remaining taxes because of an error as to the quantity of the land: *Fish v. Genett* (Ky.), 56 S. W. Rep. 813. As to the right to reimbursement in Louisiana, see *Fix v. Dierker's Succession*, 30 La. An. 175; *Person v. O'Neal*, 32 La. An. 228; *Shannon v. Lane*, 33 La. An. 489; *Davenport v. Knox*, 34 La. An. 409; *Hickman v. Dawson*, 35 La. An. 1086. As to the lien in Maine, see *Whitmore v. Learned*, 70 Me. 276. In Michigan the statutory provision for a lien includes those who have purchased from the state lands bid in by the latter for taxes: *Tillotson v. Saginaw Circuit Judge*, 97 Mich.

been sold for the irregular tax, reach the same end by giving the purchaser a lien on the land for the sum justly payable.

585. A tax-sale purchaser who took possession of the land without giving the statutory notice to party in interest could not, on vacation of the decree under which he bought, recover the purchase price, or the amount of taxes subsequently paid: *Corrigan v. Hinkley*, 125 Mich. 125. The lien in Michigan must be enforced in chancery after a judgment has been rendered in ejectment against the holder of the tax-title: *Weimer v. Porter*, 42 Mich. 569; *Ellsworth v. Freeman*, 43 Mich. 488; *Nester v. Busch*, 64 Mich. 657; *Tillotson v. Saginaw Circuit Judge*, 97 Mich. 585. The first two of these cases hold that in the proceeding to enforce the lien the mere receipt does not prove the payment of the taxes; and the last holds the statute of limitations inapplicable. The right to the lien will be cut off by subsequent tax-sales to others: *Robbins v. Barron*, 32 Mich. 36, 33 Mich. 124. And where two persons hold invalid tax-titles on the same land, the prior holder's claim for reimbursement will be subordinate to the lien of the holder of the subsequent deed: *Robbins v. Barron*, 34 Mich. 517. Under the Michigan statute of 1899, taxes earned by an invalid tax-sale do not "remain" a lien on the land so as to entitle the purchaser at a subsequent sale to have his deed canceled and the money refunded: *O'Connor v. Auditor-General (Mich.)*, 86 N. W. Rep. 1023. In Minnesota no lien passes to the purchaser at a tax-sale which is void because of illegal levy and assessment: *Barber v. Evans*, 27 Minn. 92; *Burdick v. Graham*, 38 Minn. 482. As to the lien in that state for taxes paid by the tax-sale purchaser after the sale, see *Sprague v. Roverud*, 34 Minn. 75; *Taylor v. Slingerland*, 39 Minn. 470; *Pfefferle v. Wieland*, 55 Minn. 202, 60 Minn. 328; *Lewis Co. v. Knowlton (Minn.)*, 86 N. W. Rep. 875. Receipt held evidence of the payment, but not of the existence, of such subsequent tax: *Brown v. Corbin*, 40 Minn. 508. It was held in *Webb v. Bidwell*, 15 Minn. 479, that where the statute makes provision for proceedings to enforce a lien for the taxes when the tax-deed proves defective, these must be followed as the sole remedy. In Mississippi, where the title proves defective the purchaser may charge the land in equity with the amount paid: *Meeks v. Whatley*, 48 Miss. 387; *Ingersoll v. Jeffords*, 55 Miss. 37; *Cogburn v. Hunt*, 56 Miss. 718, 57 Miss. 681. And the purchaser has a lien if the taxes were due, even though the sale was invalid, or was based on an invalid levy or assessment: *Kaiser v. Harris*, 63 Miss. 590; *Capital State Bank v. Lewis*, 64 Mich. 727. Where part of the tax for which the land was sold was illegal, the sale being void the purchaser's lien was for the amount paid, the subsequent taxes, interest, and damages: *Peterson v. Kittredge*, 65 Miss. 33. In a suit against a tax-title holder to quiet title, the defendant's claim to reimbursement for the price paid at the sale and for taxes paid subsequently should be asserted by cross-bill: *Preston v. Banks*, 71 Miss. 601. The lien given by the Missouri statute for the amount paid at a tax-sale is not affected by irregularity in the proceedings: *White v. Shell*, 84 Mo. 569. And such lien includes redemption money and interest: *Alen v. Buckley*, 94 Mo. 158. In Nebraska, if the levy of a tax is valid, the purchaser, whether an in-

But if the tax was vicious in its inception there can be no lien,¹ and the same is true if by law the land was exempt from taxation.² The lien, when it exists, is a creature of the statute, and is governed and limited by it.

dividual or a county, at an irregular or even a void tax-sale, is subrogated to the rights of the public, and has a lien not only for the taxes paid at the sale but also for prior and subsequent taxes paid by him, with interest: see *Peet v. O'Brien*, 5 Neb. 360; *Pettit v. Black*, 8 Neb. 52; *Miller v. Hurford*, 11 Neb. 377; *Covell v. Young*, 11 Neb. 510; *Sullivan v. Merriam*, 13 Neb. 157; *Reed v. Merriam*, 15 Neb. 323; *Bryant v. Estabrook*, 16 Neb. 217; *Schoenheit v. Nelson*, 16 Neb. 235; *Holmes v. Andrews*, 16 Neb. 296; *Otoe County v. Brown*, 16 Neb. 394; *McClure v. Warner*, 16 Neb. 447; *Merriam v. Hemple*, 17 Neb. 345; *Dillon v. Merriam*, 22 Neb. 151; *Merriam v. Rauens*, 23 Neb. 217; *Roads v. Estabrook*, 35 Neb. 297; *Adams v. Osgood*, 42 Neb. 450; *Weston v. Meyers*, 45 Neb. 95; *Frank v. Scoville*, 48 Neb. 169; *Johnson v. Finley*, 54 Neb. 733; *Medland v. Connell*, 57 Neb. 10; *Sanford v. Moore*, 58 Neb. 654; *Merrill v. Ijams*, 58 Neb. 706; *Grant v. Bartholemew*, 58 Neb. 839; *Medland v. Linton*, 60 Neb. 249; *Adams v. Osgood*, 60 Neb. 779; *John v. Connell* (Neb.), 85 N. W. Rep. 82; *Carman v. Harris* (Neb.), 85 N. W. Rep. 848; *Green v. Hellman* (Neb.), 90 N. W. Rep. 913. The right to foreclose the lien in Nebraska will be barred in five years from the expiration of the time to redeem: *Stevens v. Paulsen* (Neb.), 90 N. W. Rep. 211, and earlier cases cited *ante*, p. 987. The tax-sale purchaser cannot sue the owner of the property at law to recover the taxes: *Carman v. Harris*, *supra*. In New Jersey the interest of a purchaser at the tax-sale remains a lien on the premises: *Burgin v. Rutherford*, 56 N. J. Eq.

666. And in that state such a purchaser can claim as a lien the amount paid for the title, and also the taxes assessed and paid by him after he accepted the title and before it was declared invalid, the assessment itself being declared invalid: *Columbia Bank v. Jones* (N. J.), 17 Atl. Rep. 808. In North Dakota tax-receipts and redemption certificates given to the holder of a void tax-deed are not liens on the land since they were not made at the time when the holder had any title or interest in the land: *Sheets v. Paine* (N. D.), 86 N. W. Rep. 117. In Ohio the grantee in an invalid tax-deed is subrogated to the state's lien for the amount paid at the tax-sale and for taxes subsequently paid, with interest: *Allen v. Russell*, 59 Ohio St. 137. Finding in South Dakota that taxes were a valid lien: *Clark v. Darlington*, 11 S. D. 418. In Tennessee a purchaser of lands at a tax-sale is entitled to a lien on such lands for the purchase price and taxes subsequently paid, though the sale be void; "the taxes must be made to appear to be due and a charge upon the land:" *Strother v. Reilly*, 105 Tenn. 48. As to the right to reimbursement in Texas, see *Cantagrel v. Von Lupin*, 58 Tex. 570. And in Wisconsin: *Hart v. Smith*, 44 Wis. 213; *Morrow v. Lander*, 77 Wis. 77.

¹ See *Harper v. Rowe*, 53 Cal. 233; *Early v. Whittingham*, 43 Iowa 162; *Nichols v. McGlathery*, 43 Iowa 189; *Roberts v. Deeds*, 57 Iowa 320.

² *Gaither v. Lawson*, 31 Ark. 279; *Sully v. Poorbaugh*, 45 Iowa 453; *Hoffmire v. Rice*, 22 Kan. 749; *Jeffries v. Clark*, 23 Kan. 448.

CHAPTER XVI.

REDEMPTION OF LANDS FROM TAX SALES.

General policy. It is not the policy of the law that any man should forfeit his estate because from inability, or even from negligence, he has failed to meet his engagements or to perform his duties by some exact day which has been prescribed by statute. On the contrary, it is for the welfare of every community that the law should favor the citizen in all reasonable measures for the preservation of his estate against losses which might result from his misfortunes or his faults, extending to him all the liberality that is consistent with justice to others and to a proper regard for the interest of the public. The principle is recognized in the liberality shown to those desirous to redeem from the technical forfeiture of mortgage estates, as well as in the provisions made for redemption from judicial sales. It is also very properly recognized in the laws providing for redemption from tax-sales.

General rules. The statutes on this subject have little uniformity, but certain general rules govern the right to redeem under them all; and it may be sufficient for our purposes to give these rules, with such illustrations of practical application as may be found in the reported cases.

1. *Construction of statutes.* The statutes which give the right are to be regarded favorably and construed with liberality. Abundant reason for this is assigned in the cases which recognize the rule. It has been justly remarked that the right of the government to sell lands for taxes, as it is accustomed to do, can only be maintained on "the absolute sovereignty of the state in the exercise of its taxing power. But it is a severe exercise of power. To divest ownership, without personal notice and without direct compensation, is the instance in which a constitutional government approaches most nearly to an unrestrained tyranny. Whatever tends to modify this right is favorable to the citizen, and ought to be liberally construed, on

the principle that remedial statutes are to be beneficially expounded. Redemption is the last chance of the citizen to recover his right of property."¹ Consequently the right of the party cannot be defeated by any failure of an officer to make

¹ *Woodward, J.*, in *Gault's Appeal*, 33 Pa. St. 94, 97. See, also, *Dubois v. Hepburn*, 10 Pet. 1; *Corbett v. Nutt*, 10 Wall. 64; *Schenck v. Peay*, 1 Dill. 267; *Boyd v. Holt*, 62 Ala. 296; *Henry v. Florida Land, etc. Co.*, 38 Fla. 269; *Rice v. Nelson*, 27 Iowa 148; *Winchester v. Cain*, 1 Rob. (La.) 421; *Bonds v. Greer*, 56 Miss. 710; *Mastersson v. Beasley*, 3 Ohio 301; *Patterson v. Brindle*, 9 Watts 98; *Corbett v. Nutt*, 18 Grat. 674; *Hale v. Penn's Heirs*, 25 Grat. 261; *Poling v. Parsons*, 38 W. Va. 80; *Jones v. Collins*, 16 Wis. 594; *Karr v. Washburn*, 56 Wis. 203. Although the place for redemption is, under the statute, in the office of the clerk of the circuit court for the county in which the lands are situated, yet as provisions for redemption should be liberally construed, a redemption can be effected outside of the clerk's office as well as in it if the holder of the tax-sale certificate assents to it: *Henry v. Florida Land, etc. Co.*, *supra*. Outstanding rights of redemption from a sale of land bid in by the state are not cut off by a conveyance upon an application to purchase from the state the title acquired by it at a later sale for delinquent taxes subsequently assessed: *Parsons v. Newman*, 99 Va. 298. The Arkansas statute providing that the owner of lands delinquent for taxes should have a right of redemption for one year, after which he was to have no peculiar privilege over any one else, the lands, if not redeemed, to remain in the clerk's office a year longer, during which time they were to be subjected to redemption by any person whatever who should pay the taxes, etc., the clerk to execute a conveyance, was held unconstitutional as depriving the owner of due process of law: *Bagley v. Castile*, 42 Ark. 77; *Shaw v. Hill*, 46 Ark. 333; *Tupy v. Kocourek*, 66 Ark. 433. For various questions as to the right to redeem under the statutes of Illinois, see *Stamposki v. Stanley*, 109 Ill. 210. As to the right under certain Minnesota statutes, see *Cole v. Lamm*, 81 Minn. 463. As to the right of redemption where lands in West Virginia have been forfeited for failure to enter for taxes, see *Read v. Dingess*, 60 Fed. Rep. 21; *Morrill's Heirs v. Scott*, 61 Fed. Rep. 769; *Waggoner v. Wolf*, 28 W. Va. 820. Evidence held not to show a redemption or an intention to pay delinquent taxes: *Wilson v. Carrico*, 155 Ind. 570. One is authorized, in paying the amount of taxes levied upon his land, to rely upon the treasurer for the proper application of the money paid, and the treasurer's failure to make such application is ground for redemption from a sale for the taxes: *Henderson v. Robinson*, 76 Iowa 603. After tender and application to redeem the land the grantee in an invalid tax-deed cannot avail himself of a statute making the recitals in a tax-deed and the deed itself evidence of the regularity of the proceedings by taking out a second deed regular in form: *Vestal v. Morris*, 11 Wash. 451. Whether the act of a person paying to the clerk of the county court a sum of money specified in the clerk's official receipt has operated as a redemption or not is a question of law to be decided by the court: *Roger v. Shaffer*, 30 W. Va. 347. It was held in *Martin's Executrix v. Slaughter* (Ky.), 50 S. W. Rep. 27, that in confirming a

the proper record, and sale after a redemption will be a nullity.¹ The owner is not required to redeem from an illegal sale.²

2. *Redemption a statutory right.* But though the statutes are to be construed favorably, yet as the right depends upon them, the person seeking to redeem must bring himself within their provisions.³ He must therefore come within the stat-

sale to satisfy a lien for the cost of street improvements it was error to order a deed at once instead of giving time to redeem as required by the statute.

¹Fenton v. Way, 40 Iowa 196; Burke v. Cutler, 78 Iowa 299. Where the sheriff failed to file his report, and the purchaser did not file his certificate — which the statute provided might be filed if the sheriff failed to make his report, and with the same effect as the report — until two days before the expiration of the two years allowed for redemption, the land-owner, who was in the meantime willing but unable to redeem because of the absence of a report or certificate, did not lose his right: Tug River Coal Co. v. Brewer, 91 Ky. 402. Where the deed was required to lie in the town clerk's office twelve months, during which the land-owner could redeem, it was held that it should be deposited with all convenient speed, and that four years after the sale was too late: Ives v. Lyon, 7 Conn. 504. As to the effect of officers allowing a right to redeem where it was disputed, see Soutter v. Miller, 15 Fla. 625. As to the granting, in New York, of an order for redemption, the power to vacate such order, and the review of such order, see People v. Wemple, 144 N. Y. 478.

²Fish v. Genett (Ky.), 56 S. W. Rep. 813; Estabrook v. Royon, 52 Ohio St. 318; Simpson v. Meyers, 197 Pa. St. 522. One who has redeemed

land from a county which bid it in on a sale for the non-payment of taxes illegally levied against it a second time is entitled to recover the amount paid on such redemption, as the illegal sale conferred no title upon the county, and hence there could be nothing due it by way of redemption: Clapp v. Pinegrove T'p, 138 Pa. St. 35.

³Hartman v. Reid (Colo. App.), 69 Pac. Rep. 787; Montford v. Allen, 111 Ga. 18; Bitzer v. Becke (Iowa), 89 N. W. Rep. 193; McMillan v. Hogan (N. C.), 40 N. E. Rep. 63. In Massachusetts one entitled to redeem should make tender to the purchaser, although the latter has, while disseized, made conveyance to another: Faxon v. Wallace, 98 Mass. 44, 101 Mass. 444. So in Louisiana, redemption may be effected by tendering to the purchaser, within one year, the amount of the taxes and interest, and it is immaterial that before the tender he conveyed his title to a third person: Wheelwright v. Lemore, 56 Fed. Rep. 163. See Douglass v. McKeever, 54 Kan. 767. But in State v. Woodbridge, 46 N. J. L. 109, it was held that where the statute provided that redemption might be made by depositing the amount paid by the purchaser with the township committee, a tender to the purchaser himself was not a compliance with the act. In Danser v. Johnson, 25 W. Va. 380, it was held that a husband, who, as general agent for the management of his wife's separate

utory time,¹ and circumstances of excuse, like the prevalence of civil war, cannot enlarge the time when the statute does not

estate, purchased land at a tax-sale in his wife's name, and with money derived from her separate estate, was a proper person to whom to make tender for redemption.

¹Montford v. Allen, 111 Ga. 18; Pearson v. Patterson, 44 Iowa 413; Scofield v. McDowell, 47 Iowa 129; Long v. Smith, 62 Iowa 329; Reeves v. Bremer County, 73 Iowa 165; Bitzer v. Becke (Iowa), 89 N. W. Rep. 193; McIntosh v. Marathon Land Co. (Wis.), 85 N. W. Rep. 976. And this, even though a deed to the purchaser is not executed: Pearson v. Patterson, *supra*; Scofield v. McDowell, *supra*. After the period of redemption has elapsed the delinquent land-owner's interest in the land ceases, and he is not affected by the tax-sale purchaser's rescinding an assignment, procured by fraudulent representations by a third person, of the certificates of purchase: Wood v. Welpton, 29 Fed. Rep. 405. It was held in Merriman v. Lyman, 124 U. S. 434, that where the owner of property sold for taxes redeems before the county commissioners direct the execution of the deed, the latter is ineffectual. In Blood v. Negrotto, 47 La. An. 1132, it was held that where the tax-sale purchaser did not pay the taxes on the property other than those for which the sale was made, he could not hold the land against the former owner to whom a certificate of redemption was issued after the time to redeem had expired. Under a statute providing that the owner may redeem within one year by paying the amount paid by the purchaser with interest from the date of purchase, the year of redemption runs from the date of the sale, and not from the sheriff's deed: Boyd v. Wilson, 86 Ga. 379. But the sale is not completed until payment of the price,

and the owner has twelve months from such payment within which to tender the redemption money: Wood v. Henry, 107 Ga. 389. Where the statute provides that redemption may be made within three years from the day of sale, the time runs from the date of sale even though for lack of bidders the county bids in the land; and the owner does not have three years from the assignment by the county of the certificate: Doudna v. Harlan, 45 Kan. 484. In Louisiana the period of redemption does not date from the filing for record of the written statement by the tax-collector of the adjudication, as such instrument is equivalent to a deed to the purchaser: Taylor v. Moise, 52 La. An. 2016. Where the forfeiture to the county is not a sale, and where the county sells land so forfeited and issues a certificate of purchase, the time to redeem runs not from the date of forfeiture but from the date of such certificate: State v. Maple, 16 Wash. 430. The Minnesota statute extending to three years the time of redemption applies to the redemption of unforfeited lands bid in by the state and not yet assigned: State v. Smith, 36 Minn. 456. In Minnesota the right to redeem lands delinquent for taxes terminates after the lands have been assigned to the state: State v. Holden, 75 Minn. 512. It has been held in New York that the statute limiting the time for redemption does not apply where the state is the purchaser, as no authority is given for proceeding against the state: Turner v. Boyce, 11 Misc. Rep. 502, 32 N. Y. Supp. 433. If a certain number of years from the day of the sale is allowed for redemption, the day of the sale is to be excluded in the computation: Hare

provide for it,¹ although the purchaser may so enlarge it by delaying to take his certificate,² or to deposit his deed,³ or, under some statutes, by allowing the land to be sold again for taxes.⁴ He who would redeem must also pay the full amount of the purchase-money with statutory interest and penalty, if any, irrespective of equitable circumstances which might seem to entitle him to claim a deduction;⁵ but a sufficient tender will

v. Carnall, 39 Ark. 196; Cable v. Coates, 36 Kan. 191; Richards v. Thompson, 43 Kan. 245; Hicks v. Nelson, 45 Kan. 47; Whittlesey v. Hoppenyan, 72 Wis. 140. The Wisconsin statute limiting the time for redemption does not run against a landlord in favor of one who, after acquiring a tax-deed, fraudulently induces the landlord to give him possession, since the possession thus acquired is the landlord's: Pulford v. Wheeler, 76 Wis. 555. The Wisconsin statute providing that when land should for five successive years be sold for taxes and bid in by the county the county's title should be absolute, was held, in Baldwin v. Ely, 66 Wis. 171, not to be unconstitutional as special or class legislation, or as taking property without due process of law. Under the Wisconsin statute providing for the foreclosure of tax-deeds found invalid in suits brought by the holders to quiet title, the statutes giving the right of redemption within one year from all sales "except on execution or decretal order" apply to sales under decrees in such suits, and the purchaser's right to a deed does not mature until one year from the sale: Williams v. Hedrick, 101 Fed. Rep. 876. Further as to the time allowed for redemption by particular statutes, see Miller v. Howell, 86 Ga. 653; Judah v. Brothers, 71 Miss. 914; Le Blanc v. Illinois Central R. Co., 72 Miss. 669; McKee v. Spiro, 107 Mo. 452; Burgin v. Rutherford, 56 N. J. Eq. 666; Tiddy v. Graves, 126 N. C.

620; Lander v. Bromley, 79 Wis. 372. A receipt given by the officer after the time to redeem has expired is a nullity: Thornton v. Smith, 6 Ark. 508.

¹ Finley v. Brown, 22 Iowa 538. See Keely v. Sanders, 99 U. S. 441; Montford v. Allen, 111 Ga. 18.

² Tug-River Coal Co. v. Brewer, 91 Ky. 402; Maina v. Elliott, 51 Cal. 8.

³ Berthold v. Hoskins, 38 Fed. Rep. 772; West v. Duncan, 42 Fed. Rep. 430. See Ives v. Lyon, 7 Conn. 504; White v. Brooklyn, 122 N. Y. 53.

⁴ For cases under the Illinois statute providing that where a tax-sale purchaser suffers the land to be sold again for taxes before the expiration of the second annual sale therefor, the land shall be subject to redemption until the expiration of a like term from the date of the second sale, see Gage v. Parker, 103 Ill. 528; Maher v. Brown, 183 Ill. 575; Netterstrom v. Kerneys, 187 Ill. 617; Eggleston v. Gage, 33 Ill. App. 184.

⁵ See Holcombe v. Beauchamp, 101 Ga. 711; Connecticut Mut. L. Ins. Co. v. Stinson, 62 Ill. App. 319; Reeves v. Bremer County, 73 Iowa 165; State v. Tufts, 108 Mo. 418; Jones v. Duras, 14 Neb. 40; Towle v. Holt, 14 Neb. 221. A private corporation in the hands of a receiver is bound by the same rule as to redemption: Rice v. Jerome, 97 Fed. Rep. 719, 38 C. C. A. 388. Where the owner neglected to pay taxes or to redeem his lands after sale under a belief that the taxes had been paid, the mistake does not entitle him to

always work a redemption.¹ The same strict rules which apply to others apply to infants and other persons under disability, unless the statute in terms makes exceptions in their

relief against the consequences of the omission: *Playter v. Cochran*, 37 Iowa 258. A purchaser of lands which had been sold for taxes prior to his purchase is not entitled to redeem because of having, after the purchase, inquired of the treasurer if there were unpaid taxes, and been told that there were not; at the same time not making inquiry for tax-sales: *Moore v. Hamlin*, 38 Iowa 482. Compare *Van Benthuyzen v. Sawyer*, 36 N. Y. 150. Mailing to the county treasurer the day before redemption expired a draft which was received two days later is not a delivery of the draft to the treasurer so as to effect a redemption of lands sold for taxes: *Paine v. Boynton*, 124 Mich. 194. Under a statute requiring one who seeks to redeem to deposit with the county treasurer "an amount of money equal to taxes, etc.," coin or legal tender is contemplated, and as the treasurer is presumed to have done his duty by requiring such, he cannot require the purchaser to accept part of the amount in county scrip, but will be compelled by *mandamus* to make full payment in money: *Murphy v. Smith*, 49 Ark. 37. In *People v. Bleekwenn*, 126 N. Y. 310, it was held that as a tax-sale does not constitute payment of the taxes, but is merely an assignment of the tax-lien to the purchaser, redemption from a sale made to enforce an assessment for a local improvement may be made in certificates issued for such improvements. A previous owner redeeming land that had been sold to the state a second time need not pay costs of a stranger's application to purchase where the land was not continued in the name of the previous owner:

Dooley v. Christian, 96 Va. 534. As to proof of payment by agent, see *Burke v. Cutler*, 78 Iowa 299. Rent paid by the owner during the period allowed for redemption cannot be treated as paid towards redemption: *Lamar v. Sheppard*, 84 Ga. 561. See *Spengin v. Ferry*, 37 Iowa 242. On the other hand, the enjoyment by the tax-sale purchaser's grantee of the rents and profits while he was in possession under a deed executed to the purchaser upon defective proof of service of notice was held not to operate as an equitable redemption, although such rents and profits amounted to more than the amount required for redemption; the possession being in good faith and under color of title: *Babcock v. Bonebrake*, 77 Iowa 710. Owner held to have abandoned his right to redeem by withdrawing money paid by him into court: *Cooper v. Cook*, 108 Iowa 301. As to the right to the redemption money, see *Smith v. Frankfort*, 2 Kan. App. 411; *State v. Snyder*, 34 Neb. 345; *Remsen v. Wheeler*, 105 N. Y. 573; *Roger v. Shaffer*, 30 W. Va. 347. Action for redemption money barred by lapse of six years from time of tax-sales: *Knudtson v. Leary*, 108 Wis. 203.

¹ *Brooks v. Hardwick*, 5 La. An. 675; *Basso v. Benker*, 33 La. An. 432; *Spanier v. De Voe*, 52 La. An. 581; *Taylor v. Moise*, 52 La. An. 2016; *Burns v. Ledbetter*, 54 Tex. 374; *Sperry v. Gibson*, 3 W. Va. 522. Tender is an act *in pais*, and may be proved to defeat a tax-deed: *Cooper v. Shepardson*, 51 Cal. 298. As to claim and denial of tender, see *Lamar v. Sheppard*, 80 Ga. 25. One seeking to redeem should tender the full amount required by law: Har-

favor,¹ as it does in some states, though the granting of this favor to them is far from general.² Where the statute makes no provision for the redemption of an undivided interest, the

mon v. Steed, 49 Fed. Rep. 779. And where less than is due is tendered, redemption will not be affected: *Fitts v. Huff*, 63 Miss. 594. Nor will the purchaser's lien be discharged: *Sanford v. Moore*, 58 Neb. 654. See, also, *Holcombe v. Beauchamp*, 101 Ga. 711.

¹*Smith v. Bacon*, 20 Ark. 17; *Junction v. Burke*, 53 Ark. 430; *Dumphy v. Hilton*, 121 Mich. 315; *Heard v. Walton*, 39 Miss. 388; *McCormack v. Russell*, 25 Pa. St. 185. Where a statute in force at the time a decree for delinquent taxes was rendered gave married women two years after the removal of the disability of coverture in which to redeem from a tax-sale, which statute was, however, repealed before the sale by another act without an exception in favor of married women, it was held that the latter statute must determine the right of exemption: *Thompson v. Sherrill*, 51 Ark. 453.

²Saving clause in Kansas statutes of 1876 held broad enough to give a minor, whose land was sold under the tax-law of 1868, the right to redeem after the enactment of the law of 1876: *Crawford v. Shaft*, 35 Kan. 478. Under the Minnesota statute the right of redemption is given to an infant who has either a vested or contingent interest in the lands sold: *Minnesota Debenture Co. v. Dean* (Minn.), 89 N. W. Rep. 848. A statute allowing redemption from sale of lands of minors or insane persons in one year after removal of disability applies not only to persons having temporary insane delusions, but to all persons incapable of comprehending the duty to pay taxes: *Hawley v. Griffin* (Iowa), 82 N. W. Rep. 905. Provision that an

insane person may redeem his lands sold for taxes within one year after his disability has been removed does not by implication limit the power of such person's committee to redeem: *Powell v. Smallwood* (W. Va.), 37 S. E. Rep. 551. Where the right of redemption accrues to an infant it may be exercised during infancy, or by the infant personally in the year after he becomes of age: *White v. Straus*, 46 W. Va. 794. Where the statute allowed to minors a year after coming of age to redeem, it was held that a minor might redeem within that time though his interest was under a parol trust which the trustee might have refused to recognize: *Karr v. Washburn*, 56 Wis. 303. Under that statute an infant whose lands have been sold for taxes under a void judgment may redeem the same from taxes: *Tucker v. Whittlesey*, 74 Wis. 74. In Iowa a minor or his representative may at any time during his majority redeem from a tax-sale of land devised to him. If such land has been sold for taxes and the purchaser has quitclaimed to another and taken a mortgage back, he cannot, by foreclosing the mortgage, get a title which will cut off the minor's right to redeem: *Strang v. Burris*, 61 Iowa 375. A statute providing that if a minor's land is sold he may redeem within a year after the removal of the disability applies only to land owned by the minor at the time of the sale, not to land owned by the minor when sold and vesting afterwards in the minor: *Stevens v. Cassady*, 59 Iowa 113; *Doudna v. Harlan*, 45 Kan. 484; *Kulp v. Kulp*, 51 Iowa 341; *Pearsons v. American Ins. Co.*, 83 Iowa 358; *McMillan v. Hogan*

person who owns such an interest can redeem only by paying all the redemption money.¹ The statute in force at the time of the sale governs the right of redemption.²

(N. C.), 40 S. E. Rep. 63; McCormack v. Russell, 25 Pa. St. 185. But the minor's right of redemption is not precluded by his deed's not having been on record at the time of the sale: Douglass v. Lowell, 55 Kan. 574. The burden of proof of showing that he owned the land at the date of the sale is, however, upon the minor when he sues to redeem: Harding v. Vaughn, 36 Fed. Rep. 742. Where, the statute providing that a minor whose land has been sold for taxes may redeem at any time within one year after his disability has been removed, or such redemption may be made by the guardian or legal representatives at any time before the delivery of the deed, plaintiff inherits land from a minor after sale thereof for taxes, her right of redemption expires in one year from decedent's death though she is herself a minor: McGee v. Bailey, 86 Iowa 513. But in Mississippi it is held that the time for redemption where the right has accrued to an infant's heir begins to run from the time when the infant would have attained his majority had he lived: McNamara v. Baird, 72 Miss. 89. A minor's statutory right of redemption is not personal to the minor but may be enforced by his vendee: Neil v. Rozier, 49 Ark. 551; McConnell v. Swepston, 66 Ark. 141; Stout v. Merrill, 35 Iowa 47. But this is only by virtue of the statutory recognition of the minor's vendee; otherwise it would have been held that the privilege is strictly personal: Bender v. Bean, 52 Ark. 145. And the right can be exercised only by one to whom the minor has voluntarily transferred his interest, and not by one who has acquired

the estate in opposition to him; for example, a purchaser at foreclosure of the minor's land: McConnell v. Swepston, *supra*. Statute providing for sale without redemption on foreclosure of lien for the taxes in case of tax-deed's being ineffectual, held not applicable in case of lands of infants or insane persons: Ristine v. Johnson, 143 Ind. 44; Wagner v. Stewart, 143 Ind. 78. As to redemption by infants and married women under statutes making exceptions in their favor, see, also, Keith v. Freeman, 43 Ark. 296; Price v. Ferguson, 66 Miss. 404; Lynch v. Brudie, 63 Pa. St. 206; Jones v. Collins, 16 Wis. 594; Dayton v. Relf, 34 Wis. 86.

¹O'Reilly v. Holt, 4 Woods 645; People v. McEwen, 23 Cal. 54; Quinn v. Kenney, 47 Cal. 147. Part of a parcel sold as an entirety cannot be redeemed separately without a statute expressly authorizing it: State v. Schaack, 28 Minn. 358. Where the statute permits redemption of an undivided interest the right may be enforced by *mandamus*: People v. Detroit Treasurer, 8 Mich. 14. If lands are improperly grouped and sold, this does not affect the right to redeem in parcels: Penn v. Clemans, 19 Iowa 372. Where taxes are levied upon two lots owned by one person and assessed together, and subsequently one of the lots passes to a different owner, in an action by the latter against the county to quiet title, the county having bid in the two lots at tax-sale, the court should apportion the amount to the different lots, and require the original owner to pay only the amount justly due on his lots: Rochford v. Fleming, 10 S. D. 24.

²Thompson v. Sherrill, 51 Ark. 453.

3. *Special conditions.* A very common condition to redemption is that the party redeeming shall pay a certain specified interest on the sum paid in the purchase; an interest so large that its exaction is in the nature of a penalty. It is not imposed, however, exclusively as a penalty, but is given as an inducement to parties to come forward as bidders at tax sales, and thus make more certain that the state will receive the full amount of the taxes levied by making certain to purchasers a reasonable compensation for any loss of bargains. The right to exact such an interest is undoubted;¹ but the owner need

¹ As to the right to impose penalties on redemption, see *Augustine v. Jennings*, 43 Iowa 198. It is said in *San Francisco, etc. L. Co. v. Banbury*, 106 Cal. 129, that it is not the policy of the state to increase the burdens of taxation beyond the necessary costs of collection, or to impose any greater burden in a redemption from a delinquent tax-sale than is necessary to secure the payment of the original tax. Interest of forty per cent. sustained: *Kettle v. Shervin*, 11 Neb. 65. And of fifty per cent.: *Estes v. Stebbins*, 25 Kan. 315. One having a right to redeem from a valid tax must tender the back taxes and penalties regardless of statutes of limitations: *Long v. Smith*, 67 Iowa 22. The fact that the sale was irregular does not relieve the owner, seeking to redeem, from the obligation of paying the interest and penalties prescribed by the statute in order to effect a redemption: *Rice v. Jerome*, 97 Fed. Rep. 719, 38 C. C. A. 388. The owner of land who has tendered taxes paid by the purchaser, with principal and interest, must pay the same to redeem, though the tax-deed be void: *Chicago, B. & Q. R. Co. v. Kelley*, 105 Iowa 106. A statute requiring that the redemptioner shall pay "the purchase-money . . . and all taxes which have been paid thereon with interest on such taxes" does not require the payment of interest on the

amount paid at the tax-sale: *Ristine v. Johnson*, 143 Ind. 44. The "taxes" and "interest thereon," on which the person redeeming must, under the Idaho statute, pay a penalty of fifty per cent., do not include the costs and expenses of the sale: *Cummings v. Como* (Idaho), 38 Pac. Rep. 650. The interest required to be paid under the Minnesota statute is the sum paid, with interest, and not necessarily the full amount of taxes, with interest and costs: *State v. Johnson* (Minn.), 86 N. W. Rep. 610. As to the interest to be paid by a minor on redeeming from a tax-sale of his lands, see *Douglass v. Lowell*, 55 Kan. 574; *Baird v. McNamara* (Miss.), 30 South. Rep. 69. Where land owned by a resident who had personalty from which a tax might have been collected is assessed as non-resident, the owner may redeem on paying the taxes and common interest: *Lynam v. Anderson*, 9 Neb. 367. If a municipal ordinance provides that on redemption of a lot sold for city taxes the buyer shall be repaid his principal money with ten per cent. interest, that is his whole indemnity, and he is not entitled to rents of the lot after an offer to redeem made in proper time: *Jones v. Johnson*, 60 Ga. 260. Where the owner is unable to redeem because the purchaser does not file his certificate under a statute allowing redemption within two years from the

not pay interest on an illegal sale.¹ Another condition frequently imposed is the payment of all taxes paid by the purchaser after the sale, with interest.²

4. *Judicial remedies.* It follows from what has been said that the land-owner is not in general entitled to relief, either at law or in equity, if for any reason he has failed to claim and exercise his statutory right.³ A case of fraud, however,

day of sale, on payment of the purchase-money "with interest at thirty per cent. per annum," he is required to pay thirty per cent. for the two years only, and merely the legal rate of interest thereafter: *Tug-River Coal Co. v. Brewer*, 91 Ky. 402.

¹ *Fish v. Genett* (Ky.), 56 S. W. Rep. 813.

² See *Harmon v. Steed*, 49 Fed. Rep. 779; *Harman v. Stead*, 59 Fed. Rep. 962; *Byington v. Hamilton*, 37 Kan. 758; *McLachlan v. Carpenter*, 75 Minn. 17; *State v. Peltier* (Minn.), 90 N. W. Rep. 375; Report of Com'rs, 49 N. J. L. 488. Requirement held to include municipal taxes: *Turner v. White*, 97 Ala. 545; *Cobb v. Vary*, 120 Ala. 263; *Tebbetts v. Charleston*, 33 W. Va. 705. As to the statutory requirement that duplicate receipts for subsequent taxes paid be filed with the county auditor, see *Slyfield v. Barnum*, 71 Iowa 245; *Johnson v. Brown*, 71 Iowa 609; *Elliott v. Parker*, 72 Iowa 746. It was held in *Buell v. Boylan*, 10 S. D. 180, that a mortgagee of land could redeem from a sale for taxes assessed against it without paying the personal tax which was not a lien thereon.

³ Redemption cannot be had in equity: *Mitchell v. Green*, 10 Met. 101. A bill to redeem land from a valid sale for taxes is not within the general power of courts of equity: *Baldwin v. Wilbraham*, 140 Mass. 459; *Barker v. Mackay*, 168 Mass. 76. Except as it is permitted by statute,

and then it must be under such conditions as the statute may attach: *Craig v. Flanagan*, 21 Ark. 319. If the owner of the land, instead of redeeming, obtains an injunction staying the issue of a deed until the time to redeem has expired, his right to redeem is gone: *Long v. Smith*, 62 Iowa 329. And the court cannot extend the statutory period within which redemption from a tax-deed is to be made, and money paid under its order after the statutory period has expired is unavailable for redemption: *Bitzer v. Becke* (Iowa), 89 N. W. Rep. 193. In Arkansas the purchaser at a sale, under a decree of court, by the commissioner of state lands is a necessary party to a bill by the owner to set aside the sale and for redemption: *Memphis Land & T. Co. v. Clark* (Ark.), 11 S. W. Rep. 765. Under the Iowa statute providing for equitable actions to redeem, the holder of an unrecorded assignment of a mortgage is not a necessary party, and is bound by a decree although not made a party: *Van Gorder v. Hanna*, 72 Iowa 572. Such equitable action is a proceeding questioning the title acquired under the treasurer's deed, and plaintiff must show title at the time of the sale: *Bowers v. Hallock*, 71 Iowa 218; *Lynn v. Morse*, 76 Iowa 665. Where both parties claim title from a common grantor, plaintiff need only show a perfect claim of title from such grantor without showing title in him: *McKee v.*

on the part of the purchaser, or of an officer, whereby the land-owner has been induced to withhold the exercise of his right, or prevented from claiming it, may constitute an exception to this general rule.¹ Equity might very justly relieve where the charges demanded on redemption had been officially swelled to illegal proportions;² or where the tax-purchaser, by deceiving the land-owner as to the land sold, had prevented his redeeming in due season,³ or in any other case where the facts are such as to bring it within any general head of equity jurisprudence. Equitable terms may be imposed in granting relief, but these will commonly be limited to the payment of such sum as the purchaser would have been entitled to on statutory redemption.⁴

Spiro, 107 Mo. 452. Further as to such action, see *Viele v. Van Steenberg*, 31 Fed. Rep. 249; *Serrin v. Brush*, 74 Iowa 489; *Lynn v. Morse*, 76 Iowa 665; *Medland v. Walker*, 96 Iowa 175; *Smith v. Callanan*, 103 Iowa 218. Under a statute in Massachusetts the court may decree redemption on a bill filed within five years after the tax sale, if the circumstances render it equitable: *Widensum v. Bender*, 172 Mass. 436. The day on which the sale was made is to be excluded in determining the period in which suit to redeem may be brought: *Clark v. Lancy*, 178 Mass. 460. Where the owner cannot find the tax-sale purchaser he is not required to redeem under the statutory proceeding, but may bring an equitable suit to redeem: *Ibid.* Evidence of diligence in attempting to redeem held sufficient to authorize decree in such suit: *Ibid.* A statutory bill to redeem is allowed in New Jersey for one year from the time the title is perfected. See *Culver v. Watson*, 28 N. J. L. 548. In Indiana the five years' limitation governing actions for the recovery of land sold for taxes has been held not to apply to suits to establish rights to redeem and to quiet title: *Kraus v. Montgomery*, 114 Ind. 103.

¹See *Martin v. Barbour*, 34 Fed. Rep. 701; *Harrison v. Owens*, 57 Iowa 314; *Leas v. Gaverich*, 77 Iowa 275; *Laing v. McKee*, 13 Mich. 124. The mere fact that the land sold was a trust estate does not dispense with necessity of redeeming: *Dewey v. Donovan*, 126 Mass. 335. Reliance by a mortgagee on a mortgager's statement that a tax-sale of the property was an error, and that he would have it canceled, does not so excuse the mortgager's neglect to redeem within the statutory time as to warrant a bill to redeem: *Glos v. Evanston, etc. Assoc.*, 186 Ill. 586. Where, pending litigation to enforce a special assessment against a homestead, the owner abandoned his wife, leaving her in possession of the homestead, which was sold for the assessment without her knowing of the suit or sale, it was held she should be allowed to redeem though the statutory time had elapsed: *Nevin v. Allen (Ky.)*, 26 S. W. Rep. 180.

²See *Gage v. Busse*, 102 Ill. 592; *Wilder v. Cockshutt*, 25 Kan. 504.

³*Koon v. Snodgrass*, 18 W. Va. 320.

⁴A tender of such sum should be made before bringing suit: *Blanton v. Ludeling*, 30 La. An. 1232. But circumstances may excuse a tender: see *London v. Spellman*, 80 Fed. Rep.

5. *Conditions imposed on the purchaser.* Whatever the statute may make provision for, subsequent to the sale, in order to the protection of the interest of the parties having the right to redeem, must be strictly performed. The reasons which require this are the same that render imperative a strict compliance with all those provisions which are to be observed in the interest of the taxpayer before the sale is made.¹ One of the most usual requirements is the publication of a notice to the taxpayer, with perhaps in addition a personal service upon the owner in case he is known and is a resident. Every provision of this nature must be strictly complied with.² Nothing

592, 26 C. C. A. 13; *Miller v. Montague*, 32 La. An. 1290; *Wederstrandt v. Freyham*, 34 La. An. 705. A bill to redeem, filed under the statute by an infant, implies an offer to pay such amounts as the law allows to the purchaser; and if such tender is not met by objections to its terms, or to the failure actually to tender money, it terminates the purchaser's estate: *Bender v. Bean*, 52 Ark. 132. Nor is an affidavit of tender required in a suit to redeem brought by an infant after reaching his majority: *Burgett v. McCrary*, 61 Ark. 456. Where, in an action to redeem, plaintiff tendered and brought into court the amount which he in good faith believed to be due, judgment in his favor was not reversed although a larger sum was found to be due: *Kraus v. Montgomery*, 114 Ind. 103. In such an action plaintiff cannot recover costs unless he tenders the amount due; but where he is entitled to a credit of the rental value, which cannot be ascertained in advance, he may recover costs though no tender is made: *Elliott v. Parker*, 72 Iowa 746. Where the defendant in a bill to quiet title under a tax-deed prays cancellation and redemption, an offer in his answer to pay the amount which may be found to be due is a sufficient tender: *Crawford v. Liddle*, 101 Iowa 108. And an

allegation that defendant has at all times been ready to pay the just and lawful amount of the taxes, and offering to pay, is not objectionable as being a conditional tender: *Cone v. Wood*, 108 Iowa 260. If the tender is refused, relief will be given as if it had been accepted: *Herzog v. Gregg*, 23 Kan. 726. The payment required should include not only the taxes technically legal, but any payments which equitably should be refunded, and especially any which the state might exact on re-assessment: *Parks v. Watson*, 20 Fed. Rep. 764. See *Muskegon Lumber Co. v. Myers*, 56 Ark. 199; *Brophy v. Taylor*, 30 Ill. App. 261.

¹ *Hereford v. O'Connor* (Ariz.), 52 Pac. Rep. 471.

² *Denike v. Rourke*, 3 Biss. 39; *Emeric v. Alvarado*, 90 Cal. 444; *Langlois v. McCullom*, 181 Ill. 195; *Ellsworth v. Van Ort*, 67 Iowa 222; *Bowers v. Hallock*, 71 Iowa 218; *Chicago, B. & Q. R. Co. v. Kelley*, 105 Iowa 106; *Blackstone v. Sherwood*, 31 Kan. 35; *Church v. Smith*, 121 Mich. 97; *Sanborn v. Mueller*, 38 Minn. 27; *State v. Nord*, 73 Minn. 1; *Thompson v. Burhans*, 61 N. Y. 52. See *Merrill v. Dearing*, 32 Minn. 479; *Wilson v. McKenna*, 52 Ill. 43; *Hendrix v. Boggs*, 15 Neb. 469; *Zahradnicek v. Selby*, 15 Neb. 579; *Seaman v. Thompson*, 16 Neb. 546; *Westbrook*

can be substituted for it;¹ the right to it cannot be waived by one who chances to be in possession of the land but who has

v. Willey, 47 N. Y. 457; *Jenks v. Wright*, 61 Pa. St. 410. And compare *Beumer v. Woll* (Minn.), 90 N. W. Rep. 330; *Wright v. Sperry*, 21 Wis. 331. That a statute requiring notice may apply where sale has already been made, see *Coulter v. Stafford*, 56 Fed. Rep. 564, 6 C. C. A. 18; *Oullahan v. Sweeney*, 79 Cal. 537. But not where the right to a deed has become absolute: *Rollins v. Wright*, 93 Cal. 395. In Iowa the requirement of notice was held applicable to cities taxing under special charters; and when land taxed to a person by name by the county in which a city is situated is sold for city taxes, the owner must be given notice to redeem although the city taxed the land to one "unknown": *Crawford v. Liddle*, 101 Iowa 148. In Minnesota the requirement that notice to redeem be served applies equally to the certificate of sale and to the certificate of assignment of the state's interest: *Nelson v. Central L. Co.*, 35 Minn. 408. That requirement, however, though applicable to assignees of the interest of the state before forfeiture, is inapplicable to an assignee or grantee acquiring such interest after forfeiture, in which case, by the terms of the statute, the conveyance is absolute and without redemption: *State v. Smith*, 36 Mich. 456. This notice is not required to be served in behalf of the state: *Ibid.* And that statute requires the notice to be given, although the name of the owner is stated in the assessment book as "unknown," and there is no person in the actual possession of the premises: *State v. Halden*, 62 Minn. 346; *Hoyt v. Clark*, 64 Minn. 139. Although the statute requires the holder of a tax-certificate to present

the same to the county auditor, who thereupon shall prepare the notice to redeem, yet the notice may be made out without presenting the certificate where the latter has been destroyed, since the auditor can obtain from the records in his office the necessary data: *Hinkel v. Krueger*, 47 Minn. 497. In New York notice to redeem must be served after the execution and delivery of the tax-lease. Service before such delivery is premature and ineffective: *Donahue v. O'Connor*, 45 N. Y. Super. Ct. 301; *Smith v. Walker*, 56 N. Y. Super. Ct. 391, 4 N. Y. Supp. 632; *Lockwood v. Gehlert*, 53 Hun 15, 6 N. Y. Supp. 20. Where the statute does not require the notice of application for a deed to be dated, such a notice, if it contains all the matters therein required, and if it is served the proper time before the day of application named in it, is sufficient, though dated within that time: *Clarke v. Mead*, 102 Cal. 516. It has been held that one who derives title from the grantee in a tax-deed takes title subject to defects arising from errors in the service of notice by the tax-sale purchaser: *Gonzalia v. Bartelsman*, 143 Ill. 634.

¹In Illinois it has been decided that where by law notice to redeem was required to be served on the person who was assessed, and the notice was not given, the tax-deed was void even though the person assessed had no interest in the land, and though the purchaser had published notice in a newspaper three months before the time to redeem had expired, describing the land, stating his purchase, and also when the redemption would expire: *Barnard v. Hoyt*, 63 Ill. 341.

no interest in it,¹ and the owner may rely on his right to it, and wait until he receives it before taking proceedings to redeem.² Notice, when to be given by an officer, is an official act, and should be put in writing; but whether in writing or not, must be distinct and full, and the evidence of giving it should be preserved in the proper office.³ Among particular requirements of the notice in the several states are that it describe the land sold;⁴ that it state that the land has been sold for delinquent taxes,⁵ and when;⁶ that it state the year in which the land was taxed or specially assessed;⁷ that it state whether the sale was for a tax or a special assessment;⁸ that it state the amount for which the land was sold;⁹ that it state the sum for which redemption may be made;¹⁰ that it state,

¹ Jackson v. Esty, 7 Wend. 148.

² Dentler v. State, 4 Blackf. 258; Doughty v. Hope, 3 Denio 594; Arthurs v. Smathers, 38 Pa. St. 40.

³ Broughton v. Journeay, 51 Pa. St. 31.

⁴ See Esker v. Heffernan, 159 Ill. 58; Griffiths v. Utley, 76 Iowa 292; Funson v. Bradt, 105 Iowa 471; Sperry v. Goodwin, 44 Minn. 207; Reimer v. Powell, 47 Minn. 237; Clason v. Baldwin, 152 N. Y. 204; Stokes v. Allen (S. D.), 89 N. W. Rep. 1023. A notice omitting the state and county, except from the caption, was held sufficient: Sickles v. Union Inv. Co., 109 Iowa 450. Where the notice erroneously states the quantity of land, but otherwise correctly describes the property, the statement of the quantity will be treated as surplusage: Rowland v. Brown, 75 Iowa 679.

⁵ See Hughes v. Cannedy, 92 Cal. 382.

⁶ See Hughes v. Cannedy, 92 Cal. 382; Long v. Wolf, 25 Kan. 522; Kipp v. Fitch, 72 Minn. 65.

⁷ See Taylor v. Wright, 121 Ill. 455; Brophy v. Harding, 137 Ill. 621; Sperry v. Goodwin, 44 Minn. 207; Smith v. Buhler, 121 N. Y. 213; Harrell v. Enterprise Sav. Bank, 183 Ill. 538. See, also, Hammond v. Carter, 155 Ill. 579.

⁸ See Gage v. Bani, 141 U. S. 344; Gage v. Waterman, 121 Ill. 115; Stillwell v. Brammell, 124 Ill. 338; Gage v. Davis, 129 Ill. 236; Gage v. Dupuy, 134 Ill. 132, 137 Ill. 652; Bailey v. Smith, 178 Ill. 72; Harrell v. Enterprise Sav. Bank, 183 Ill. 538.

⁹ See Sperry v. Goodwin, 44 Minn. 207. The purchaser was held to get no title under a tax-deed which affirmatively stated that the land was sold for a certain amount, and that the notice to redeem stated that it had been sold for a less amount: Landregan v. Peppin, 86 Cal. 122.

¹⁰ See Western Land Assoc. v. McComber, 41 Minn. 20; Robert v. Western Land Assoc., 43 Minn. 3; McNamara v. Fink, 71 Minn. 66; Knight v. Knoblauch, 77 Minn. 8. Some of these cases apply the maxim *de minimis*. In Reed v. Lyon, 96 Cal. 501, it was held that a notice which stated as the amount due one dollar more than in fact was due was not a sufficient compliance with the statute to bar the owner's right to redeem. In People v. Cady, 105 N. Y. 299, it was decided that a notice to redeem should require payment of interest from the day of sale and not from the day of payment of the purchase-money. It was ruled in Watkins v. Inge, 24 Kan. 612, that a tax-

allowing the proper legal interval, the time when the right of redemption will expire, or when the purchaser will apply for his deed;¹ that it be served by the lawful holder of the certificate or by his assignee;² that it be served upon the persons in the actual possession or occupancy of the premises,³ and upon

deed is not void because the tax-roll shows a much larger amount necessary to redeem the land than the sum published in the redemption notice.

¹ See *Landregan v. Peppin*, 86 Cal. 122; *California & N. R. Co. v. McCartney*, 104 Cal. 616; *Wilson v. McKenna*, 52 Ill. 43; *Gage v. Bailey*, 100 Ill. 530; *Wisner v. Chamberlin*, 117 Ill. 568; *Gage v. Davis*, 129 Ill. 236; *Benefield v. Albert*, 132 Ill. 665; *Brophy v. Harding*, 137 Ill. 621; *Blackstone v. Sherwood*, 31 Kan. 35; *Jackson v. Challis*, 41 Kan. 247; *Torrington v. Rickershauser*, 41 Kan. 486; *Ireland v. George*, 41 Kan. 751; *Parker v. Branch*, 42 Minn. 155; *Kenaston v. Great Northern R. Co.*, 59 Minn. 35; *Peterson v. Peterson*, etc. Co., 61 Minn. 118; *Bergen v. Anderson*, 62 Minn. 232; *State v. Halden*, 62 Minn. 246; *McNamara v. Fink*, 71 Minn. 66; *Kipp v. Fitch*, 72 Minn. 65; *Clary v. O'Shea*, 72 Minn. 105; *State v. Nord*, 73 Minn. 1; *Kipp v. Johnson*, 73 Minn. 34; *Kipp v. Robinson*, 75 Minn. 1; *Mather v. Curley*, 75 Minn. 248; *Merchants' Realty Co. v. St. Paul*, 77 Minn. 343; *Gahre v. Berry*, 82 Minn. 200; *Patterson v. Grettum* (Minn.), 85 N. W. Rep. 907; *Towle v. St. Paul*, etc. L. Co. (Minn.), 86 N. W. Rep. 781; *Doherty v. Real Estate*, etc. Co. (Minn.), 89 N. W. Rep. 853; *Clason v. Baldwin*, 152 N. Y. 204; *Hennessey v. Volkening*, 30 Abb. N. C. 100, 22 N. Y. Supp. 528. If the notice specifies as the last day for redemption a day which is Sunday, it will be void: *Gage v. Davis*, 129 Ill. 236; *Hill v. Timmermeyer*, 36 Kan. 252. But where the redemption notice gives the full statutory time of three

years for redemption, and one day more, and the last day named in the notice is Sunday, the owner will not be permitted to set aside a deed following such notice without showing that he was misled by the notice, and that he offered to redeem on the day after the last day named: *Hicks v. Nelson*, 45 Kan. 47. A notice extending beyond the statutory period the time allowed for redemption has been held equally as fatal as one which requires it: *Wisner v. Chamberlain*, 117 Ill. 568; *State v. Nord*, 73 Minn. 1; *Kipp v. Johnson*, 73 Minn. 35. So, though the notice extends the time but one day longer than the law allows: *Benefield v. Albert*, 132 Ill. 665.

² See *Hale v. Hughes* (Ariz.), 56 Pac. Rep. 732; *Swan v. Whaley*, 75 Iowa 623; *Sickles v. Union Inv. Co.*, 109 Iowa 450; *Rector, etc. Co. v. Maloney* (S. D.), 88 N. W. Rep. 575.

³ See *Gage v. Bailey*, 102 Ill. 11; *Wisner v. Chamberlin*, 117 Ill. 568; *Whities v. Farsons*, 73 Iowa 137; *Bradley v. Brown*, 75 Iowa 180; *Snell v. Dubuque & S. C. R. Co.*, 88 Iowa 442; *Jackson v. Esty*, 7 Wend. 148. Where a railroad has condemned and taken possession of land sold for taxes it should be served with notice to redeem, and is not affected by a tax-deed without notice: *Gormoe v. Sturgeon*, 65 Iowa 147. Service on one of several tenants in possession as well as on the owner thereof in whose name the premises were taxed, held insufficient: *Hintrager v. McElhinny*, 112 Iowa 325. The occupation intended by the statute is that at the time notice is given: *Gonzalia v. Bartelsman*, 143 Ill. 634; *Hand*

the persons to whom they are taxed or by whom they are owned, or who are interested in them.¹ It has been held that a mortgagee is not an "owner of, or person interested in," the

v. Ballou, 12 N. Y. 541. Where notice is required to be served on the person in possession, if it is served on the owner it will be presumed, in the absence of showing, that he has possession: *Hall v. Guthridge*, 52 Iowa 403. See *Ellsworth v. Low*, 62 Iowa 178. A statute requiring notice to be "served upon every person in actual possession or occupancy" makes no distinction between the terms "possession" and "occupancy," and the service is not required to be made on one who has only a constructive possession or a constructive occupancy: *Taylor v. Wright*, 121 Ill. 455. Under such a statute where a person is in actual possession of part of the premises, personal notice should be served upon him: *Smith v. Gage*, 12 Fed. Rep. 32; *Shelley v. Smith*, 97 Iowa 259; *Chicago, B. & Q. R. Co. v. Kelley*, 105 Iowa 106; *Comstock v. Beardsley*, 15 Wend. 348; *Bush v. Davison*, 16 Wend. 550. Service upon a husband and wife, by handing a copy to the wife, is insufficient where it does not appear that the husband was present: *Gage v. Bani*, 141 U. S. 344; *Gage v. Lyons*, 138 Ill. 590. Persons who acquire rights in the property after notice to redeem has been given are not entitled to the notice, but hold as purchasers *pendente lite*: *Taylor v. Wright*, 121 Ill. 455. Service of notice upon one who is in possession of the land as agent of the tax-sale purchaser is not a compliance with the statute: *Burton v. Perry*, 146 Ill. 71. Further as to who is to be deemed in actual possession or occupancy, see *Drake v. Ogden*, 128 Ill. 603; *Hammond v. Carter*, 155 Ill. 579; *Sapp v. Walker*, 66 Iowa 497; *Whities v. Farsons*, 73 Iowa 137; *Callanan v.*

Raymond, 75 Iowa 307; *Rowland v. Brown*, 75 Iowa 679; *Cahalan v. Van Sant*, 87 Iowa 593; *Medland v. Walker*, 96 Iowa 175; *Shelley v. Smith*, 97 Iowa 259; *Comstock v. Beardsley*, 15 Wend. 348; *Jones v. Chamberlain*, 109 N. Y. 100; *People v. Campbell*, 143 N. Y. 335; *People v. Wemple*, 144 N. Y. 478; *People v. Turner*, 145 N. Y. 451. The notice need not be had on the premises, but may as well be served elsewhere: *Gage v. Bailey*, 102 Ill. 11.

¹ See *Gage v. Schmidt*, 104 Ill. 106; *Gage v. Reid*, 118 Ill. 35; *Gage v. Waterman*, 121 Ill. 115; *Stillwell v. Brammell*, 124 Ill. 338; *Gage v. Stewart*, 127 Ill. 207; *Miller v. Pence*, 132 Ill. 149; *Smith v. Prall*, 133 Ill. 308; *Hughes v. Carne*, 135 Ill. 519; *Cotes v. Rohrbeck*, 139 Ill. 532; *Gage v. Webb*, 141 Ill. 533; *Palmer v. Riddle*, 180 Ill. 461; *Glos v. Boettcher*, 194 Ill. —; *Heaton v. Knight*, 63 Iowa 686; *Hillyer v. Farneman*, 65 Iowa 227; *Ellsworth v. Cordrey*, 65 Iowa 303; *Kessey v. Connell*, 68 Iowa 430; *Slyfield v. Barnum*, 71 Iowa 245; *Fuller v. Butler*, 72 Iowa 729; *Nycum v. Raymond*, 73 Iowa 224; *Wilson v. Russell*, 73 Iowa 395; *Lynn v. Morse*, 76 Iowa 665; *Steele v. Murry*, 80 Iowa 336; *Clifton Heights Land Co. v. Randell*, 82 Iowa 89; *Cahalan v. Van Sant*, 87 Iowa 593; *Wilkin v. Wilkin*, 91 Iowa 652; *American Exch. Nat. Bank v. Crooks*, 97 Iowa 244; *Sickles v. Union Inv. Co.*, 109 Iowa 450; *Young v. Charnquist* (Iowa), 86 N. W. Rep. 205; *Hawkeye L. & B. Co. v. Gordon* (Iowa), 88 N. W. Rep. 1081; *Blackistone v. Sherwood*, 31 Kan. 35; *Western Land Assoc. v. McComber*, 41 Minn. 20; *Sperry v. Goodwin*, 44 Minn. 207; *Mitchell v. McFarland*, 47 Minn. 535; *Eide v. Clarke*, 57 Minn.

land, upon whom this notice should be served.¹ A separate notice need not be issued upon each tax-certificate, but the notice may include more than one tract.² Each person who has

397; Snyder v. Ingalls, 70 Minn. 16; Berglund v. Graves, 72 Minn. 178; People v. Cady, 105 N. Y. 299; People v. Heggeman, 22 N. Y. St. Rep. 109, 4 N. Y. Supp. 352. Where the land is taxed to a decedent's estate the executors are entitled to notice of the expiration of the time to redeem: Crawford v. Liddle, 101 Iowa 148. Under a statute requiring notice to be served upon the person to whom the land was assessed, the deed was void even though the person assessed had no interest in the land, and though notice was published: Barnard v. Hoyt, 63 Ill. 341. The persons to be served are those in whose names the land is assessed at the time the notice is given: Rice v. Bates, 68 Iowa 397; Smith v. Callanan, 103 Iowa 218; Thomson v. Dickey, 42 Neb. 314. So where the statute requires service on the "owners or parties interested:" Gonzalia v. Bartelsman, 143 Ill. 634; Lauer v. Weber, 177 Ill. 115. Where the owner of the realty has made an assignment for the benefit of his creditors under the state insolvent law, it is not necessary that a tax-sale purchaser give to the court or the assignee a notice of the expiration of the time to redeem, or that, in order to perfect his title, he cause such assignee to be brought into the tax proceedings: Wyman v. Baker (Minn.), 86 N. W. Rep. 432. In Iowa, where the land previously assessed as "unknown" was assessed to the tax-sale purchaser, it was held that he was not required to serve notice upon himself: Knight v. Campbell, 76 Iowa 730. But in Minnesota notice must issue in all cases, as well where the tax-certificate is held by the person in whose name the land is assessed

as in other cases: Wakefield v. Day, 41 Minn. 344; Reimer v. Newell, 47 Minn. 237.

¹Smyth v. Neff, 123 Ill. 310; Glos v. Evanston, etc. Assoc., 186 Ill. 586. In North Carolina a tax-deed is held effective as against a prior mortgage, though the mortgagee had no notice of the sale: Powell v. Sikes, 119 N. C. 231. Where notice of sale and of the time for redemption is required to be given to a mortgagee, a sale for taxes and assessments which became liens after the recording of a mortgage does not give the purchaser a superior title to the mortgagee without notice: Ruyter v. Reid, 121 N. Y. 498. The bare fact of the existence of a mortgage recorded forty-eight years before the sale is insufficient to require proof of the service of notice upon the mortgagee under a statute requiring such proof upon the owner and mortgagee before the purchaser can receive his deed: Martin v. Stoddard, 127 N. Y. 61. Under a statute allowing mortgagees a certain time after notice in which to redeem, a release to a mortgagee of the equity of redemption, after a tax-sale, which release contains the words "subject to any and all unpaid taxes," is not equivalent to "actual notice" of a tax-sale: Keith v. Wheeler, 159 Mass. 161.

²Drake v. Ogden, 128 Ill. 603; Hammond v. Carter, 155 Ill. 579; Jenswold v. Doran, 77 Iowa 692; Snyder v. Ingalls, 70 Minn. 16. As to what constitutes one tract under a statute giving the printer for publishing list and notice "thirty cents for each lot or tract in such list:" Bohan v. Ozaukee County, 88 Wis. 498.

a right to redeem is, however, entitled to a separate notice.¹ In some states notice has been held unnecessary where unoccupied land is taxed to unknown owners.² The giving of the statutory notice to redeem, while indispensable if a tax-deed is desired, is not necessary where the holder of the tax-certificate merely wishes to foreclose his lien.³ Sometimes provision is made for serving the notice by mail,⁴ or by publication in a newspaper,⁵ or by posting in public places.⁶ The proof of no-

¹ *White v. Smith*, 68 Iowa 313. Notice to infant who has no guardian held invalid: *Levy v. Newman*, 50 Hun 438, 3 N. Y. Supp. 324. It was held in *Rice v. Bates*, 68 Iowa 393, that one who has exchanged his certificate of purchase for a void deed is still, in law, a certificate-holder upon whom notice must be served.

² See *Tuttle v. Griffin*, 64 Iowa 455; *Meredith v. Phelps*, 65 Iowa 118; *Griffin v. Tuttle*, 74 Iowa 219; *Irwin v. Burdick*, 79 Iowa 69; *Lawrence v. Hornick*, 81 Iowa 193. In such case, after deed made, facts presumed not to require notice: *Garmoe v. Sturgeon*, 65 Iowa 147; *Funson v. Bradt*, 105 Iowa 471. Notice required in Minnesota though owner's name stated in assessment book as unknown: *State v. Halden*, 62 Minn. 246; *Hoyt v. Clark*, 64 Minn. 139. As to the showing, in Illinois, that land was vacant and unoccupied so as to excuse service of notice: *Coombs v. Goff*, 127 Ill. 431.

³ *Bryant v. Estabrook*, 16 Neb. 217; *Lammers v. Comstock*, 20 Neb. 341; *Helprey v. Redick*, 21 Neb. 80; *McClure v. Lavender*, 21 Neb. 181; *Van Etten v. Medland*, 53 Neb. 569; *Grant v. Bartholemew*, 57 Neb. 673; *Merrill v. Ijams*, 58 Neb. 700; *Carmann v. Harris* (Neb.), 85 N. W. Rep. 848.

⁴ See *Jones v. Seattle*, 19 Wash. 669.

⁵ Where the land has been erroneously listed to "owners unknown," notice given by publication accordingly was held not good under a statute requiring notice to be given to the owners personally or by publication: *Hartley v. Boynton*, 17 Fed. Rep. 873, 5 McCrary 453. Notice by publication as in the case of non-residents where the owner was in fact a resident of the state, though defective, will not avoid the tax-deed: *McQuity v. Doudna*, 101 Iowa 144. As to the showing of diligent search and inquiry for owners or occupants in order to justify service by publication, see *Harding v.*

⁶ See *Stout v. Coates*, 35 Kan. 382; *Washington v. Hosp*, 43 Kan. 324; *Choat v. Phelps* (Kan.), 66 Pac. Rep. 1002. Where, under the statute, service is only to be made by posting when the premises are unoccupied, the affidavit of notice by posting gives no authority to issue the deed unless it shows they were not occupied: *Hall v. Capps*, 107 Cal. 513. And an affidavit, filed eight days after the date appointed for the application for the deed, stating that

the property "is entirely unoccupied," is insufficient for failure to state the time of the service of notice: *Miller v. Williams* (Cal.), 67 Pac. Rep. 788. If the affidavit states that the lists of lands unredeemed from tax-sales were posted in certain named places and also in his office, it will be presumed, in the absence of evidence to the contrary, that the places of posting were public places as required by the statute: *Washington v. Hosp*, *supra*.

tice must show with reasonable certainty that the requirements of the statute in regard to notice have been complied

Brophy, 133 Ill. 39; *Burton v. Perry*, 146 Ill. 71; *Van Matre v. Sankey*, 148 Ill. 536; *Sullivan v. Eddy*, 164 Ill. 391; *Hammond v. Carter*, 155 Ill. 579; *Glos v. Boettcher* (Ill.), 61 N. E. Rep. 1017. That the deputy sheriff may make the return showing the facts warranting publication, see *Reimer v. Newell*, 47 Minn. 237. Under the Minnesota statute, where the name of the owner of the property sold is unknown, and no one is in actual possession, the notice must be made by publication: *State v. Halden*, 62 Minn. 246; *Hoyt v. Clark*, 64 Minn. 139. Where a leasehold interest was sold and was to be conveyed at the expiration of two years from the sale, but the statute required the corporation, at least six months before the expiration of two years from the sale, to cause an advertisement to be published at least twice in each week, for six weeks successively, that unless the lands were redeemed by a certain day they would be conveyed, held that this was imperative, and that the six weeks must be completed six months before the expiration of two years: *Doughty v. Hope*, 3 Denio 594. As to the necessity of following, in publishing notice, mandatory requirements, see, also, *State v. Gayhart*, 34 Neb. 192. Where notice was duly published once each week for three successive weeks, and on the day after the last publication proof of publication was made and filed, the fact that the last publication was continued for a week did not render such notice insufficient: *Cook v. Schroeder Lumber Co.* (Minn.), 88 N. W. Rep. 971. If a wrong name is used in publishing the notice, the right of redemption will not be terminated by the notice, and the stat-

ute of limitations will not begin to run upon the deed: *Slyfield v. Barnum*, 71 Iowa 245. Under a statute requiring notice to be made personally or by publication, a published notice addressed "To whom it may concern," and not containing the names of non-residents in whose name the property was assessed, is insufficient: *Rector, etc. Co. v. Maloney* (S. D.), 88 N. W. Rep. 575. A published notice sufficiently discloses the names of the owners where they are inserted opposite each tract: *Sperry v. Goodwin*, 44 Minn. 207. Where the notice as published differed from the original only in the order in which the facts were stated, and contained all the essentials, the variance was held not to be material: *Ibid.* Land was assessed in the name of "Johnson, Lot M. & Wm.," Lot M. being a non-resident, but it was in the possession of William Johnson and Albert Harper; notice to redeem addressed to William Johnson and Albert Harper was served on them, without mention of Lot M. Johnson, and notice to him without mention of the others was published; held insufficient: *Cornoy v. Wetmore*, 92 Iowa 100. In Iowa a statute providing that service of notice may be made on non-residents by publication was held not to restrict service to publications only, and a personal service on a non-resident while in the county was sufficient: *Baker v. Crabb*, 73 Iowa 412. And under a provision that "actual personal service, either within or without the state, supersedes the necessity of publication," where the land was assessed to a non-resident, and on the sale for the taxes notice of the time in which to redeem was personally served in another state,

with,¹ else the deed will be of no avail; for if there has been no notice, or if the notice is insufficient, the deed will not cut

publication of such notice was unnecessary: *Seymour v. Harrison*, 85 Iowa 130.

¹See *Gage v. Bani*, 141 U. S. 344; *Viele v. Van Steenberg*, 31 Fed. Rep. 249; *Slyfield v. Healy*, 32 Fed. Rep. 2; *Simmons v. McCarthy*, 118 Cal. 622; *Price v. England*, 109 Ill. 394; *Gage v. Hervey*, 111 Ill. 305; *Davis v. Gosnell*, 113 Ill. 121; *Wisner v. Chamberlin*, 117 Ill. 568; *Taylor v. Wright*, 121 Ill. 455; *Stillwell v. Brammell*, 124 Ill. 338; *Brickey v. English*, 129 Ill. 646; *Smith v. Prall*, 133 Ill. 308; *Perry v. Bowman*, 151 Ill. 25; *Glos v. Gould*, 182 Ill. 512; *Harrell v. Enterprise Sav. Bank*, 183 Ill. 538; *American, etc. Assoc. v. Smith*, 59 Iowa 704; *Ellsworth v. Cordrey*, 63 Iowa 675; *Stull v. Moore*, 70 Iowa 149; *Johnson v. Brown*, 71 Iowa 609; *Bolin v. Francis*, 72 Iowa 619; *Baker v. Crabb*, 73 Iowa 412; *Rowland v. Brown*, 75 Iowa 679; *Babcock v. Bonebrake*, 77 Iowa 710; *Lynn v. Morse*, 76 Iowa 665; *Smith v. Heath*, 80 Iowa 231; *Kundson v. Litchfield*, 87 Iowa 111; *Stevens v. Murphy*, 91 Iowa 356; *Funson v. Bradt*, 105 Iowa 471; *Hintrager v. McElhinny*, 112 Iowa 325; *In re New Orleans*, 52 La. An. 1073; *Jewell v. Truhn*, 38 Minn. 433; *Muller v. Jackson*, 39 Minn. 431; *People v. Cady*, 105 N. Y. 299. As to the burden of proof of service of notice, see *Nelson v. Central Land Co.*, 35 Minn. 408; *Muller v. Jackson*, 39 Minn. 431. In Iowa, the deed being *prima facie* evidences of the regularity of all proceedings prior to its execution, due service of notice to redeem will be presumed in the absence of evidence to the contrary: *Soukup v. Union Inv. Co.*, 84 Iowa 448. Facts held not to overcome such presumption:

Young v. Goodline, 106 Iowa 447. But in Illinois the statute making the tax-deed *prima facie* evidence of certain facts is not applicable to the notice to redeem: *Gage v. Bani*, 141 U. S. 344; *Kepley v. Fouke*, 187 Ill. 162. Under the New York statute making the comptroller's deed conclusive evidence after a certain period that all notices required by law were regularly given, it will be conclusively presumed that due notice to redeem was given: *Ostrander v. Darling*, 127 N. Y. 70. In *Hennessey v. Volkening*, 30 Abb. N. C. 100, 22 N. Y. Supp. 528, the purchaser's affidavit of service of notice was held not admissible as evidence of such service. Where the purchaser's affidavit shows failure to comply with the statutory requirements it cannot be aided by extrinsic evidence: *Hughes v. Carne*, 135 Ill. 519; *Esker v. Heffernan*, 159 Ill. 38. If such affidavit is wholly defective the deed is void: *Wallahan v. Ingersoll*, 117 Ill. 123. As to proof of service by publication, see *Sweeley v. Van Steenburgh*, 69 Iowa 696; *Nycum v. Raymond*, 73 Iowa 224; *Baker v. Crabb*, 73 Iowa 412; *Muller v. Jackson*, 39 Minn. 431; *Sperry v. Goodwin*, 44 Minn. 207. The affidavit of the purchaser at a tax-sale that the notice to redeem was duly posted and published is, in California, *prima facie* evidence of such publication: *Walsh v. Burke* (Cal.), 66 Pac. Rep. 866. In New York the statute requires a certificate from the comptroller that notice has been served: see *Lockwood v. Gehlert*, 127 N. Y. 241; *Clason v. Baldwin*, 152 N. Y. 204; *Caulkins v. Chamberlain*, 37 Hun 163; *Powell v. Jenkins*, 14 Misc. Rep. 83, 95 N. Y. Supp. 265.

off the right of redemption,¹ nor will it set in motion the statute of limitations,² and a person may attack the deed without showing title in himself.³ The fact that the notice is invalid will not, however, render the sale void.⁴ And if the notice is insufficient so that one gets a void deed, the purchaser may give a new notice.⁵

6. *Who may redeem.* The determination of this question may to some extent depend upon the phraseology of the statute. The general rule is, that any one may redeem who has in the land an interest which would be affected by the tax con-

¹ *Hillyer v. Farneman*, 65 Iowa 227; *Slyfield v. Barnum*, 71 Iowa 245; *Wilson v. Russell*, 73 Iowa 395; *Bradley v. Brown*, 75 Iowa 180; *Carnoy v. Wetmore*, 92 Iowa 100; *Shelley v. Smith*, 97 Iowa 259; *Chicago, B. & Q. R. Co. v. Kelley*, 105 Iowa 106; *Smith v. Harvey* (Iowa), 90 N. W. Rep. 489. In Iowa a deed without notice is not void but is voidable only: *Bowers v. Hallock*, 71 Iowa 218. One seeking to redeem from a sale and deed where the deed is not supported by notice need not show he has tendered the amount necessary to redeem: *Adams v. Snow*, 65 Iowa 435. It was held in *Grove v. Benedict*, 69 Iowa 346, that a petition assailing the validity of a tax-deed must not only allege that no notice to redeem was given, but also that there was some one entitled to notice. In *Callanan v. Lewis*, 79 Iowa 452, it was decided that redemption on account of insufficient notice or service should be by an equitable action under Iowa Code, § 893. A delay of five years from the time the deed was executed in bringing such action by one on whom notice to redeem was not served does not show such laches as to justify denial of relief: *Fuller v. Butler*, 72 Iowa 729.

² *Slyfield v. Healy*, 32 Fed. Rep. 2; *Torrence v. Shedd*, 156 Ill. 194; *Sly-*

field v. Barnum, 71 Iowa 245; *Chicago, B. & Q. R. Co. v. Kelley*, 105 Iowa 106. Where, in an action to quiet a tax-title, the defendant pleaded that no notice of the expiration of the time for redemption had been served on him, and that the land was assessed to him, it was held that this question was in issue without any reply: *Walker v. Sioux City, etc. Co.*, 65 Iowa 563.

³ *Adams v. Snow*, 65 Iowa 435; *Swan v. Harvey* (Iowa), 90 N. W. Rep. 489.

⁴ *People v. Cady*, 56 N. Y. Super. Ct. 180, 6 N. Y. Supp. 546.

⁵ *Land v. Smith*, 62 Iowa 329; *Flanagan v. St. Paul*, 65 Minn. 347. It was held in *Lauer v. Weber*, 177 Ill. 115, that a tax-deed, void because based upon a defective affidavit, could not be cured by the subsequent filing of an additional affidavit and the issue of a new tax-deed; both deeds were void. And in *Viele v. Van Steenberg*, 31 Fed. Rep. 249, it was held that the failure to file the affidavit of notice to redeem was not cured, as against one seeking to redeem, by filing an affidavit in due form and obtaining a second treasurer's deed, the suit for redemption having been commenced before such filing or the giving of such deed.

veyance.¹ A statute giving the right to redeem to the "owner" will be construed to embrace the case of the original owner, notwithstanding there is an outstanding tax-title.² It may also

¹ See *Dubois v. Hepburn*, 10 Pet. 1; *Halsted v. Buster*, 140 U. S. 273; *Rich v. Braxton*, 158 U. S. 375; *Schenck v. Peay*, 1 Dill. 267; *Wood v. Welpton*, 29 Fed. Rep. 405; *Braxton v. Rich*, 47 Fed. Rep. 178; *Nicodemus v. Young*, 90 Iowa 423; *Bradford v. Walker* (Ky.), 5 S. W. Rep. 555; *McDougal v. Montlezun*, 39 La. An. 1005; *Whitaker v. Ashby*, 43 La. An. 117; *Stone v. Stone*, 163 Mass. 474; *People v. Campbell*, 143 N. Y. 335; *Frazier v. Johnson*, 65 N. J. L. 673; *McBride v. Hoey*, 2 Watts 436; *Waggoner v. Wolf*, 28 W. Va. 820; *Yokum v. Fickey*, 37 W. Va. 762; *Rutledge v. Price County*, 66 Wis. 35. A bankrupt has been held entitled to redeem land which he owned before he went into bankruptcy: *Hampton v. Rouse*, 22 Wall. 263. One in possession and to whom the tax was assessed may redeem: *Campbell v. Packard*, 61 Wis. 88. See *Townshend v. Shaffer*, 30 W. Va. 176. In Iowa the holder of any right in lands, legal or equitable, perfect or inchoate, may redeem from a tax-sale, and the officer, it seems, should receive the money of any one coming in apparent good faith to make redemption, leaving the question of his right to be determined afterwards if disputed: *Cummings v. Wilson*, 59 Iowa 14; *Cowdry v. Cuthbert*, 71 Iowa 733. See *Chapin v. Curtenius*, 15 Ill. 427. And since, in that state, "any person entitled to redeem land sold for taxes after delivery of the deed," may maintain an action to be permitted to redeem, the plaintiff in such action need not show actual title: *Paxton v. Boss*, 89 Iowa 661. A son-in-law of an owner of lands forfeited for non-payment of taxes held not entitled to

redeem: *Dixon v. Hockady*, 36 S. C. 60. Authority of agent: *Houston v. Buer*, 117 Ill. 324; *People v. Campbell*, 143 N. Y. 335; *Townshend v. Shaffer*, 30 W. Va. 176; *Reger v. Shaffer*, 30 W. Va. 349. Presumption of authority from person in whose name payment was made: *State v. Harper*, 26 Neb. 761. And see *Merriman v. Lyman*, 124 N. C. 434; *Herman v. Stearns*, 96 Va. 58. When application for a redemption is made it devolves upon the treasurer to determine whether the applicant has such an interest in the property as entitles him to redeem; in reaching this conclusion he acts in a *quasi-judicial* capacity. His decision will be presumed to be correct until the presumption is overcome by evidence: *Hartman v. Reid* (Colo. App.), 69 Pac. Rep. 787.

² *Lancaster v. County Auditor*, 2 Dill. 478. If there have been successive tax-sales to different purchasers, a bill to redeem brought by the original owner against the last purchaser cannot be maintained if the right to redeem as against the first purchaser has been lost by lapse of five years from the time of his purchase; nor does it matter that plaintiff is an infant: *O'Day v. Bowker*, 143 Mass. 59. One in whose name land was returned delinquent, when sold to the state for taxes, may redeem, though it was sold a second time, after entry in another's name: *Dooley v. Christian*, 96 Va. 534. Under a statute giving the right of redemption only to the former owner or to an encumbrancer, the heirs of the former owner may redeem: *Rich v. Braxton*, 158 U. S. 375; *Braxton v. Rich*, 47 Fed. Rep. 178. A mortgagee held to be "owner" within

embrace any one who has a substantial interest in the premises; even a wife having a homestead right in her husband's lands,¹ or a lien creditor,² or a purchaser by executory contract.³ A purchaser at sheriff's sale of the right of one in possession may redeem, though he shows no title in the occupant.⁴ And so may a husband who claims in right of his wife;⁵ or a dowress;⁶ or a mortgagee or his assignee;⁷ or a lessee;⁸ or a guardian or

the meaning of such a statute: *Alter v. Shepherd*, 27 La. An. 207. Otherwise in Georgia: *Mixon v. Stanley*, 100 Ga. 372. A mortgager, after foreclosure, ceases to be the "owner of the land" within the meaning of the Massachusetts statute, and therefore cannot then redeem from a tax-sale: *Da Silva v. Turner*, 166 Mass. 407. It was held in *Stinson v. Connecticut Mut. L. Ins. Co.*, 174 Ill. 125, that a mortgager who knows that the mortgagee has already redeemed the property from a sale for taxes cannot avail himself of the right of redemption by payment to the county clerk as provided by statute.

¹ *Lamar v. Sheppard*, 80 Ga. 25; *Adams v. Beale*, 19 Iowa 61. Redemption by wife held to inure to husband's benefit: *Reed v. Sims* (Ky.), 16 S. W. Rep. 268. As to redemption of homestead when widow allows it to be sold, see *Tucker v. Tucker*, 108 N. C. 235. A minor child may redeem the whole homestead, the rights of the other children having expired by their reaching their majority: *Seger v. Spurlock*, 59 Ark. 147.

² *Schenck v. Peay*, 1 Dill. 267; *Swan v. Harvey* (Iowa), 90 N. W. Rep. 489; *Basso v. Benker*, 33 La. An. 432.

³ *Woodward v. Campbell*, 39 Ark. 580; *Rich v. Palmer*, 7 Or. 133. In Massachusetts it has been held that one who has bought the land by executory contract may compel the tax-sale purchaser to assign to him

on receipt of the redemption money: *Rogers v. Butler*, 11 Gray 410.

⁴ *Shearer v. Woodburn*, 10 Pa. St. 511. So may the holder of a sheriff's certificate of sale on foreclosure of a mortgage: *Gable v. Seiben*, 137 Ind. 155.

⁵ *Dubois v. Hepburn*, 10 Pet. 1.

⁶ *Rice v. Nelson*, 27 Iowa 148.

⁷ *O'Brien v. Bradley* (Ind. App.), 61 N. E. Rep. 942; *Lloyd v. Bunce*, 41 Iowa 660; *Ellsworth v. Low*, 62 Iowa 178; *Montgomery v. Burton*, 31 La. An. 330; *Faxon v. Wallace*, 101 Mass. 444; *Williams v. Hudson*, '93 Mo. 524; *People v. Edwards*, 56 Hun 377; *Manhattan Trust Co. v. Richards*, 13 S. D. 377. See *Boatmen's Sav. Bank v. Grieve*, 101 Mo. 625; *Cockerill v. Stafford*, 102 Mo. 57; *Giraldin v. Howard*, 103 Mo. 40; *McKee v. Spiro*, 107 Mo. 452; *Elliott v. Shaffer*, 30 W. Va. 347. Where the statute gave the right to redeem to a "mortgagee of record," it was held sufficient if the mortgage was on record at the time of the offer to redeem: *Hawes v. Howland*, 136 Mass. 267. The right of a mortgagee to redeem is not lost by foreclosure; it passes to the purchaser at the foreclosure sale: *Downey v. Laney*, 178 Mass. 465. That such purchaser must, in Iowa, show title in the mortgager or that he himself was owner, when he seeks to redeem, see *Peterborough Sav. Bank v. Des Moines Sav. Bank*, 110 Iowa 519. The heirs or devisees of a deceased mortgagee who had foreclosed and bought

⁸ *Byington v. Ryder*, 9 Iowa 566.

other person acting for another under disability;¹ or an executor charged with the duty of selecting and setting aside their shares to devisees.² It has even been held in a number of cases that one in possession of land by mere color of title may redeem;³ but this can hardly be universally true under the statutes of different states, which after all, it must be borne in mind, are to control in respect to the persons who are to have the privilege of redeeming as well as in other respects.⁴ It is held that one interested in lands sold *in solido* may redeem for all,⁵

in may redeem from a tax-sale: *McGauley v. Sullivan*, 174 Mass. 303. Either the owner of the land or his mortgagee has the right to redeem from a tax-sale, and it is immaterial to the purchaser which is permitted to do so, as he is only interested in the repayment of the amount of taxes for which it was sold: *Griffiths v. Utley*, 76 Iowa 292. In Georgia, prior to 1898, a mortgagee had not the right to redeem from a tax-execution sale of land: *Mixon v. Stanley*, 100 Ga. 372. A mortgagee whose lien is superior to a lien for taxes is under no obligation or necessity to redeem from a tax-sale to protect his mortgage, and cannot, therefore, recover from the county the amount so paid by him to redeem, under a statute directing the treasurer to refund taxes erroneously or illegally assessed: *Bibbins v. Polk County*, 100 Iowa 493.

¹ *Witt v. Mewhirter*, 57 Iowa 545.

² *White v. Smith*, 68 Iowa 313.

³ See *Brown v. Day*, 78 Pa. St. 129; *Foster v. Bowman*, 55 Iowa 237. The redemption will inure to the benefit of the true owner, and the party paying cannot, after the time for redemption expires, withdraw the money: *Levick v. Brotherline*, 74 Pa. St. 149.

⁴ In Mississippi "the owner or any one interested in lands" sold for taxes is not allowed to redeem, but is given the right for twelve months, in preference to all other persons, to

enter the lands as purchaser from the holder of the tax-title: see *Bonds v. Greer*, 56 Miss. 710. But this purchase is in effect a redemption: *Faler v. McRae*, 56 Miss. 227.

⁵ *Loomis v. Pingree*, 43 Me. 299; *Alexander v. Ellis*, 123 Pa. St. 81. Where a tenant in common takes a deed of the whole property from a tax-sale purchaser by paying the exact amount required for redemption, he must be presumed, in the absence of rebutting evidence, to have done so in the exercise of a legal right, and the whole property will be redeemed from the sale: *Hurley v. Hurley*, 148 Mass. 444. Where an undivided interest in lands the whole of which is subject to a tax-sale is sold on execution, the sheriff may pay the whole tax from the proceeds of sale: *Dungan's Appeal*, 88 Pa. St. 414. Where adults and infants are co-tenants of lands sold for taxes, and the limitation has expired as to the adults, the infants can only redeem their interest, and not the whole tract: *Wilson v. Sykes*, 67 Miss. 617. But see, *contra*, *Seger v. Spurlock*, 59 Ark. 147. Redemption by one tenant-in-common inures to the benefit of his co-tenants: *Scott v. Brown*, 106 Ala. 604. But a co-tenant redeeming from a tax-sale can hold until the co-tenants pay their respective shares: *Watkins v. Eaton*, 30 Me. 529; *Wilmot v. Lathrop*, 67 Vt. 671. Though a purchase by the husband of a tenant-in-

and probably he would be compelled to redeem for all unless the statute under which the sale was made provided otherwise; for the purchaser seems to be equitably entitled to have either all the land he bought, or all the purchase-money refunded.¹ But no one can be entitled to go farther in redemption than may be necessary under the law for the protection of his interest.²

7. *Who may not redeem.* A stranger to the title cannot defeat a tax-purchase by redemption. The purchaser has acquired a title which is subject only to the right of those interested to redeem: and no payment of the amount by a stranger, and no acceptance of it by any official from a stranger, can affect this right.³ Probably the acceptance of the redemption money by the purchaser himself would preclude his afterwards claiming rights under his purchase; but nothing short of his own recog-

common inures to the benefit of all his wife's co-tenants, yet he may hold the deed as security for the money he has paid: and, in a suit to enforce the statutory right of redemption, the validity of his title cannot be determined: *Chace v. Durfee*, 16 R. I. 248. Where, after a mortgage for purchase-money had been assigned to B., the land was sold for taxes levied on the personalty of a firm of which the mortgager was a member, thus compelling B. to redeem from the tax-sale in order to protect her interest, it was held B. could not recover from the members of said firm, other than said mortgager, the amount so paid to redeem: *Bibbins v. Clark*, 90 Iowa 230.

¹ *Rich v. Palmer*, 6 Or. 339; *Chace v. Durfee*, 16 R. I. 248. It seems to be the rule in Iowa that one must redeem all he has a right to redeem, and cannot compel the purchaser to accept less: *Curl v. Watson*, 25 Iowa 35; *Jacobs v. Porter*, 34 Iowa 342, 345. The redemption by one lien-holder is redemption for all: *Ellsworth v. Low*, 62 Iowa 178. See *People v. McEwen*, 23 Cal. 54. In order to redeem the

undivided part of a large tract of land from forfeiture to the state for non-entry and non-payment of taxes, such part must be carefully described and accurately located by the person seeking redemption: *State v. King*, 47 W. Va. 437. As to separate redemption of lots separately assessed by holder of note secured by deed of trust, see *Boatmen's Sav. Bank v. Grieve*, 101 Mo. 625. For a peculiar case where, after taxes had accrued against two lots the owner of them paid the taxes on one lot, mortgaged it, and allowed it to be sold on foreclosure, but subsequently conveyed the other lot, with the taxes unpaid, whereupon the mortgaged lot was seized and sold for the taxes due on the other: *Cockrum v. West*, 122 Ind. 372.

² *Goodrich v. Florer*, 27 Minn. 97; *Lloyd v. Bunce*, 41 Iowa 660.

³ See *Hartman v. Reid* (Colo. App.), 69 Pac. Rep. 787; *McArthur v. Peacock*, 93 Ga. 715; *People v. Campbell*, 143 N. Y. 335; *Goodrich v. Florer*, 27 Minn. 97; *Eaton v. North*, 25 Wis. 514; *Cousins v. Allen*, 28 Wis. 232.

dition of the unauthorized act of one who, if he had no interest, would be a mere intermeddler, could conclude him in such a case.¹

8 *Imperfect redemption.* It has sometimes happened that, by reason of fraud or other fault on the part of the officer or purchaser, a party who has in good faith attempted to redeem, and who has done all that was required of him by the party entitled to receive the money, has nevertheless failed in exact and literal compliance with the law. In such a case equity will take notice of the facts as entitling the party to relief, and will hold the redemption, which has failed in form, to have been effected for all purposes of protecting the estate against a forfeiture which, under the circumstances, the statute did not intend, and would not purposely have authorized.² But it is very justly held in all such cases, especially if the party attempting redemption has not paid all that was requisite to

¹ Byington v. Bookwalter, 7 Iowa 512; Penn v. Clemans, 19 Iowa 372. The redemption of land from a tax-sale by one who claimed the right to redeem under a forged quitclaim deed from the delinquent land-owner is impotent to convey title either to himself or those claiming under him: Wood v. Welp-ton, 29 Fed. Rep. 405. See Byer v. Healy, 84 Iowa 1. The officer to whom redemption is made need have no proof that the person offering to make it is authorized to do so, unless the statute requires this: Chapin v. Curtenius, 15 Ill. 427. Under the Mississippi code, providing that the owner of land or any person for him may within a year redeem the land from tax-sale, a redemption within that time divests all title of a purchaser, although the redemptioner is not the real owner of the land: Jamison v. Thompson, 65 Miss. 516. Where the right of a delinquent land-owner to redeem has expired by limitation, redemption by a stranger will not inure to such delinquent's benefit, and the redemptioner will not be held a trustee of

the title in his behalf: Wood v. Welp-ton, *supra*. See Staples v. Mayer, 44 La. An. 628.

² See Harman v. Stead, 59 Fed. Rep. 962; Gage v. Scales, 100 Ill. 218; Converse v. Rankin, 115 Ill. 398; Noble v. Bullis, 23 Iowa 559; Corning Town Co. v. Davis, 44 Iowa 622; Railroad Co. v. Storm Lake Bank, 55 Iowa 696; Hintrager v. Mahoney, 78 Iowa 537; Price v. Mott, 52 Pa. St. 315; Dietrick v. Mason, 57 Pa. St. 40; Alexander v. Ellis, 123 Pa. St. 81. It was decided in Bubb v. Tompkins, 47 Pa. St. 369, that redemption was effectual though by mistake of the county treasurer all of the taxes which should have been included were not. And in Forrest v. Henry, 33 Minn. 434, redemption was held effectual though by the county auditor's mistake the amount paid was less than that required by law. See Harman v. Stead, *supra*. If redemption is prevented by the officer's refusal to give a statement and receive the amount, the title is not cut off: Van Benthuyzen v. Sawyer, 36 N. Y. 150.

complete the statutory right, he shall make a clear showing that no part of the responsibility for the error justly rests upon him. If by the mutual mistake of the officer and of the party the redemption has failed, or if it is left in doubt whether the officer was in fault at all, the case presents no other ground of equity than would exist in any case where, through inadvertence or misapprehension, the party has failed to assert his right in due season; and he will be left by the law where his own negligence or inattention has placed him.¹

9. *Waiver of defects in redemption.* The holder of the tax-purchase may waive strict compliance with statutory conditions, either expressly by contract or indirectly by some act which is inconsistent with a purpose on his part to insist upon his purchase. Thus the redemption, if he consents, may be made outside of the clerk's office;² if he demands redemption and receives the sum required, he and those who subsequently claim under him will be estopped from denying the validity of the redemption on the ground that payment was not made to the county treasurer or that the person of whom demand was made was not authorized to redeem;³ if, when tendered a cheque in redemption, he refuses it solely on the ground that he is entitled to a larger sum, he waives the right to object

¹ *Easton v. Doolittle*, 100 Iowa 374; *Lamb v. Irwin*, 69 Pa. St. 436. Though the purchaser's demand for a greater sum than is necessary to redeem will excuse the production of the sum actually required, it will not have that effect unless the person seeking to redeem is ready to make a tender of the sum requisite: *Lamar v. Sheppard*, 84 Ga. 561. Where a statute provides that, if land struck off to a county remains unredeemed for five years, it may be sold, the full five years must elapse before any steps can be taken towards selling again. The officer cannot make costs by advertising within the five years: *Hier v. Rullman*, 22 Kan. 606.

² *Henry v. Florida, L. etc. Co.*, 38 Fla. 269.

³ *Hunt v. Lyman*, 76 Iowa 751. Where the purchaser receives the amount paid and delivers the certificate of sale to the land-owner's agent for such owner, the redemption is complete, and a deed afterwards issued on such certificate is invalid as against the owner or his mortgagee: *Doud v. Blood*, 89 Ga. 237. By accepting from the auditor the amount paid the latter in redeeming one of several lots purchased "in a lump," which amount was less than the proportionate value of the lot redeemed, the purchaser precludes himself from recovering the proper proportionate amount: *Darrow v. Union County*, 87 Iowa 164.

that the tender should have been in cash;¹ if, after the time for redemption has expired, he receives payment, this will be a waiver by implication;² but a tender of the amount after redemption has expired will be of no force whatever unless the tender is accepted.³

10. *Unauthorized conditions.* Neither the purchaser nor the officer can add conditions to the right to redeem. A direct attempt to do this would so manifestly be an attempt to legislate to the prejudice of the owner, that nothing could be said in justification of it. But peculiar cases, which would amount to this in legal effect, sometimes require to be tested by the general principle. Thus, where the land of one person was irregularly sold with that of others, but the infirmity in the sale was afterwards cured by a healing act, it was held that the owner could not be required, as a condition to redemption, to pay any more than the proportion of the bid that was fairly chargeable to his land; this being all that he could have been charged with had the sale been regular.⁴ So if the purchaser

¹ *Townsend v. Shaffer*, 30 W. Va. 176. Tender should be of the proper amount of lawful money, but will be excused if the purchaser places his refusal not upon the non-tender of actual money, or because the amount is not correct, but on the distinct ground that the person offering to redeem is without authority: *Poling v. Parsons*, 38 W. Va. 80.

² *Coxe v. Wolcott*, 27 Pa. St. 154; *Philadelphia v. Miller*, 49 Pa. St. 440.

³ *Thweatt v. Black*, 30 Ark. 732. In *Rogers v. Johnson*, 70 Pa. St. 224, a written agreement given by the purchaser to the owner, agreeing to convey on being paid the amount of the bid with twenty-five per cent. additional, was regarded as a good redemption. Where the purchaser, after the time for redemption has expired, acknowledges the invalidity of his title, accepts the redemption money from a part-owner, and buys his interest in the land, the effect of such redemption is to vacate the

tax-sale, and place the title where it stood before: *Jackson v. Neal*, 136 Ind. 173. If the purchaser accepts part of the redemption money, the owner will be allowed to redeem from a grantee by quitclaim from the purchaser: *Taylor v. Courtney*, 15 Neb. 190.

⁴ *Dietrick v. Mason*, 57 Pa. St. 40. As to the right to redeem from the counties in Kansas, see *Tarr v. Haughey*, 5 Kan. 625. Where the treasurer rejected a tender on the sole ground that he had no right to receive the money or give the certificate, it was not invalid, because a receipt or certificate was demanded: *People v. Edwards*, 56 Hun 377, 10 N. Y. Supp. 335. Under a statute providing that a tax-deed should be deposited by the collector with the clerk of the chancery court, that it should be canceled by the clerk on redemption by the owner within one year, and that the redemption money should be paid to those legally en-

has paid taxes, subsequently assessed upon the land, he cannot demand these as a condition to redemption, unless this is the provision of the statute.¹ And, if a resident's lands have been assessed and sold as non-resident, their character has been fixed for all the purposes of that proceeding, and the owner cannot be required to redeem on any different terms from a non-resident.²

11. *Rights pending redemption.* The purchaser has no title to the land until the time for redemption has expired. He has consequently no constructive possession of the premises, and no more right to go upon and make use of them than any stranger to the title would have. His entry upon the premises would be a trespass upon the possession, actual or constructive, of the owner, who might recover against him for any injury committed.³

titled thereto, the clerk marked the deed "Canceled," and sent it to a person who supposed he owned the land and had offered to redeem. Held, that the deed was destroyed as a muniment of title, and could not be revived by the clerk when returned to him by such person upon the latter's discovering that he did not own the land: *Adams v. Mills*, 71 Miss. 150.

¹ *Stephens v. Holmes*, 26 Ark. 48; *Buell v. Boylan*, 10 S. D. 180.

² *Garabaldi v. Jenkins*, 27 Ark. 453.

³ *Betts v. Dick*, 1 Pennewill 268; *Shalemiller v. McCarty*, 55 Pa. St. 168. See *Gault's Appeal*, 33 Pa. St. 94; *Lightner v. Mooney*, 10 Watts 407; also the cases cited *ante*, p. 985. The rule is otherwise under some statutes, but the general doctrine is that announced in the text. In *Kansas* the purchaser has no right to commit acts of waste before obtaining his deed: *Douglass v. Dixon*, 31 Kan. 310. See *Corrigan v. Hinkley*, 125 Mich. 125; *Huron Land Co. v. Robarge* (Mich.), 87 N. W. Rep. 1032. Purchaser's action for waste committed during period of redemp-

tion does not entitle him to timber cut: *Lacy v. Johnson*, 58 Wis. 414. A statute authorizing the purchaser to be put in possession before the expiration of the twelve months allowed for redemption is not obnoxious to a constitutional provision that property sold for taxes may be redeemed at any time before one year by paying the price given with twenty per cent. and costs added: *Geddes v. Cunningham*, 104 La. 306. Where the purchaser is entitled to and takes possession of the land he should, upon redemption, be allowed the value of the betterments made by him thereon: *Knowles v. Martin*, 20 Colo. 393; *Elliott v. Parker*, 72 Iowa 746; *Hintrager v. McElhinny*, 112 Iowa 325; *Baird v. McNamara* (Miss.), 30 South. Rep. 69. But he is chargeable with the rental value of the land: *Elliott v. Parker*, 72 Iowa 746. Or with the rents actually received: *Hintrager v. McElhinny*, *supra*. Under a statute providing that owners of land under tax-sales are entitled upon redemption to the full cash value of improvements made after two years from

12. *Effect upon title.* Redemption gives no new title; it simply relieves the land from the sale which had been made.¹ And this is true whether redemption is made before the statutory time had expired, or by consent of the purchaser afterwards.² If the purchaser had any other title or interest in the land besides that redeemed from, it remains entirely unaffected; his acceptance of the redemption money cannot estop him from setting it up and relying upon it.³

This principle is one of importance not only as between the party redeeming and the purchaser, but also as between the former and any third party who may have an interest in the land that would be affected by the tax-purchase. As has been seen, it may often happen that one to redeem his own interest is compelled to redeem for others also, and it may seem reasonable to him that under such circumstances he should acquire the title. But the law which gives him a privilege of redemption will not suffer him to convert it into a privilege of purchase; and whatever form the transaction may assume as between him and the tax-purchaser, the law will hold it to be in fact a redemption.⁴ The remedy of the party redeeming

the date of sale, they are entitled thereto without deduction for rents received by them before such redemption: *Bender v. Bean*, 52 Ark. 132.

¹ *Ivey v. Griffin*, 94 Ga. 689; *Gray v. Coan*, 30 Iowa 536; *Phillips v. Improvement Co.*, 25 Pa. St. 56; *Cuttle v. Brockway*, 32 Pa. St. 45; *Jenks v. Wright*, 61 Pa. St. 410. See *Wagoner v. Wolf*, 28 W. Va. 820. A remainderman who redeems from a tax-sale does not thereby acquire the life estate: *Yocum v. Zahner*, 162 Pa. St. 468. Where land sold for taxes is redeemed by the owner it becomes subject to the lien of prior delinquent taxes: *Winter v. City Council*, 101 Ala. 649; *Gray v. Coan*, 40 Iowa 327. And to the lien of a judgment rendered prior to the tax-sale: *Singer's Appeal* (Pa.), 7 Atl. Rep. 800. And to a previous mortgage: *Manning v. Bonard*, 87 Iowa 648. When property sold for taxes

is redeemed the title reverts to the original owner, and is liable for his debts notwithstanding an express subrogation of the tender of the redemption money to the owner's rights: *Cambon v. Lepine*, 40 La. An. 557. If one in possession of and claiming to own real estate under a void tax-deed subsequently procures a quitclaim deed from the rightful owner, his interest under the tax-deed merges in the stronger and superior title under the quitclaim, and he will hold the land subject to all tax-liens that would have been valid had the rightful owner never parted with his title: *African M. E. Church v. Hewitt*, 37 Kan. 107.

² *Coxe v. Wolcott*, 27 Pa. St. 154.

³ *Cooper v. Bushley*, 72 Pa. St. 252.

⁴ *Manning v. Bonard*, 87 Iowa 648; *Steiner v. Coxe*, 4 Pa. St. 13; *Coxe v. Sartwell*, 21 Pa. St. 480; *Coxe v. Wolcott*, 27 Pa. St. 154. A land-owner who buys in a tax-title he knows to

under such circumstances will be to call upon the other party or parties interested for such reimbursement or contribution as under the facts would be equitable. If, however, in any case the party redeeming would stand in no such relation to others, and be under no such restraint of an equitable nature as should have precluded his becoming purchaser of the land when it was offered for sale for the taxes for which it was actually sold, no reason will then appear why he may not, instead of redeeming from the tax-title, buy and hold it in his own interest as purchaser. He would certainly have a right to do this in any case as to all the world except such persons as could show how they were wronged in their own interests by his doing so. And as to such persons it might be held to be a redemption though as to all others a purchase.¹

13. *Legislative power over purchases.* In the matter of tax-sales it is important to understand what authority, if any, the legislature retains over them, especially in view of the very frequent and radical changes which are made in the law, and which in terms, if not in intent, apply to inchoate transactions previously had, as well as to those which are to take place under the new law. The question, for instance, whether a statute extending the right to redeem can be applied to previous sales, is one constantly liable to arise, and which, in fact, has arisen in several cases.

If the time to redeem has already expired before the passage of the new law, it is manifest such law can have no effect upon the sale. The title has now become absolute, and the legislature can no more create rights in the land in favor of the former owner than it can in favor of any other person. But if the time has not expired, and redemption is still open to the owners, the want of power is not so entirely beyond dispute.

In one case it has been decided that the time for redemption might lawfully be extended from one year to two, after the

be void will be held to redeem, and to have no claim upon the county for reimbursement: *Jones v. Miami County*, 30 Kan. 278. See *Rutledge v. Price County*, 66 Wis. 35. Under a statute providing that the state's lien for taxes on realty shall be per-

petual until payment, the fact that the owner is liable out of his personalty does not defeat the lien of another than the owner who redeems from the sale: *Gable v. Sieben*, 137 Ind. 155.

¹ See *ante*, p. 969.

sale had taken place. The decision is reasoned on the liberal construction which should be put upon redemption laws; and the conclusion was just, if no other considerations need be taken into the account.¹ Other cases have held the contrary, and, as we believe, on reasons that are conclusive. They plant themselves upon the principle that the obligation of contracts is inviolable. Now the purchase at a tax-sale is clearly a contract. It is made under the law as it then exists, and upon the terms prescribed by the law. No subsequent statute can import new terms into the contract, or add to those before expressed. If it could be changed in one particular, it could be in all; if subject to legislative control at all, it is wholly at the legislative mercy.² The same rule, some have thought, should apply to a statute shortening the time to redeem; as it is equally unjust to legislate against the owner of the land in such circumstances as in his favor.³ But with him there is no contract when the sale is made, and the remedy by redemption which the statute gives him, like remedies in general, is subject to legislative discretion.⁴

¹ Gault's Appeal, 33 Pa. St. 94.

² Wolfe v. Henderson, 28 Ark. 304; Hull v. State, 29 Fla. 79; State v. Bradshaw, 39 Fla. 137; Goenen v. Schroeder, 8 Minn. 387; State v. McDonald, 26 Minn. 145; State v. Foley, 30 Minn. 353; Merrill v. Dearing, 32 Minn. 479; Sigman v. Lundy, 66 Miss. 522; Dikeman v. Dikeman, 11 Paige 484; Roberts v. First Nat. Bank, 8 S. D. 504; State v. Fylpaa, 3 S. D. 586; Forqueran v. Donnally, 7 W. Va. 114; Robinson v. Howe, 13 Wis. 341. A statutory provision allowing the repayment of taxes to a purchaser if the sale proves invalid is part of the contract of purchase, and cannot, after the sale, be taken away by statute: Morgan v. Miami County Com'rs, 27 Kan. 89. The time within which an action to compel the execution of a conveyance or lease upon any sale for taxes may be brought can reasonably be shortened by the legislature without impairing the obligation of contracts or denying

due process of law: Wheeler v. Jackson, 137 U. S. 245. It has been held that a statute requiring the holders of tax-certificates to give notice to the owner or occupant of land before they can obtain tax-deeds does not, in its application to certificates issued prior to its enactment, impair the obligation of contracts: Coulter v. Stafford, 56 Fed. Rep. 564, 6 C. C. A. 18. See Oullahan v. Sweeney, 79 Cal. 537. But a statute requiring notice of an application for a tax-deed does not apply where the right to such deed had become absolute before the act was passed: Rollins v. Wright, 93 Cal. 395.

³ Merrill v. Dearing, 32 Minn. 481; Kipp v. Johnson, 73 Minn. 35.

⁴ Muirhead v. Sands, 111 Mich. 487, citing Baldwin v. Ely, 66 Wis. 171, and Negus v. Yancy, 22 Iowa 57. See the intimation to the same effect in Smith v. Portland, 12 Wis. 371; Robinson v. Howe, 13 Wis. 341. In Baldwin v. Ely, *supra*, a statute was

Where lands are struck off to the state, there is unquestionable power in the legislature to favor or relieve the owner of the land to any extent it may see fit.¹

Foreclosing redemption. In some states it has been thought proper to provide for a foreclosure of the right to redeem in a judicial proceeding instituted by the purchaser. In such a proceeding all questions of law going to the validity of the proceedings, as well as all questions of equity which should entitle the land-owner to relief, can be considered and settled finally. The proceeding is only to be instituted at the time² and in the manner prescribed by law, and the statute should be followed strictly. It is to some extent a proceeding in the nature of a suit to quiet title, but with more latitude of discretion in the court to adapt the relief to the equities appearing.³ As reference has already been made to this proceeding, farther discussion of it is unnecessary in this place.⁴

held valid which by its own force, and by the owner's failure to redeem within the two years allowed by it, divested of the legal title the original owner of lands sold for delinquent taxes, bid in by the county, and remaining unredeemed; no deed being required. It is held in Minnesota that the right of redemption from a tax-sale must be governed by the law in force at the date of the sale, and that the time can neither be shortened nor extended by subsequent legislation: *Merrill v. Dearing*, 32 Minn. 481; *Kipp v. Johnson*, 73 Minn. 35; *Cole v. Lamm*, 81 Minn. 463. In *Moore v. Irby*, 69 Ark. 102, it was decided that where the state acquires land at a tax-sale while the statute authorizing a minor to redeem land from such sale within two years after his majority is in force, a minor's right cannot be taken away by subsequent enactment.

¹ See *Hodgdon v. Burleigh*, 4 Fed. Rep. 111.

² *Peet v. O'Brien*, 5 Neb. 360; *Dayton v. Relf*, 34 Wis. 86.

³ See *Dentler v. State*, 4 Blackf. 258; *Gaylord v. Scarff*, 6 Iowa 179; *McGahan v. Carr*, 6 Iowa 330; *Byington v. Buckwalter*, 7 Iowa 512; *Abell v. Cross*, 17 Iowa 171; *Carter v. Hadley*, 59 Miss. 130; *McNish v. Perrine*, 14 Neb. 582. A holder of tax-certificates whose liens are barred by the statute of limitations has no equity to compel a subsequent lienholder to discharge the barred liens, or to admit their priority as a condition for foreclosure: *Alexander v. Shaffer*, 38 Neb. 812. An error in retaining, for the purpose of rendering a judgment for costs, a suit to foreclose a tax-certificate after the certificate has been redeemed, is jurisdictional, and the judgment is void although the court had jurisdiction when the suit was begun: *Two Rivers Manuf. Co. v. Beyer*, 74 Wis. 210.

⁴ See *ante*, pp. 875-896, 985-987.

CHAPTER XVII.

PROCEEDINGS AT LAW TO RECOVER LANDS SOLD FOR TAXES.

General rule. Where lands have been sold and conveyed in satisfaction of delinquent taxes, the claims of the respective parties to the title are to be determined in the customary methods.¹ The purchaser, if he finds the land occupied, may bring ejectment in the common-law courts to obtain possession, and if, on the other hand, he finds the land unoccupied and takes possession without suit, the original owner may have the like remedy against him.² Though the tax-deed be made by law *prima facie* evidence to the title in the purchaser, it is not competent by statute to provide for putting him in possession forcibly and without a judicial hearing.³ No entry is neces-

¹ An adjudication on a tax-sale gives rise to "a right of possession," but does not, of itself, confer an actual and real corporeal possession: *Handlin v. Weston Lumber Co.*, 47 La. An. 401.

² The law does not require, to perfect a tax-title, that the divested owner shall voluntarily place the purchaser in possession, or that the purchaser shall, in the absence of resistance, institute judicial proceedings and be put in possession by the sheriff; but the purchaser may himself take possession whenever he can do so without difficulty: *Martin v. Langenstein*, 43 La. An. 789. A statute giving the grantee in a tax-deed a right to commence within three years from the date thereof a suit to bar all claims of the original owner, is not exclusive of other ordinary remedies, either equitable or statutory — for example, bill to quiet title by a person in actual possession under such a deed: *Bardon v. Improvement Co.*, 157 U. S. 327. Where a

tax-sale fails to convey title to the purchaser because of illegalities in such sale, the original owner has a better right than the purchaser, and can maintain a writ of entry against him therefor: *Chandler v. Wilson*, 77 Me. 76.

³ *Calhoun v. Fletcher*, 63 Ala. 574; *Fischel v. Mercier*, 32 La. An. 704; *Mayenno v. Millaudon*, 32 La. An. 1123. Writ of assistance to put purchaser in possession: *Berkey v. Burchard*, 119 Mich. 101; *Mann v. Carson*, 120 Mich. 631; *Roberts v. Loxley*, 121 Mich. 163; *Beck v. Finn*, 122 Mich. 21; *Belmar Borough v. Kennedy*, 53 N. J. Eq. 466. Upon an application by the holder of a deed of state tax-lands for a writ of assistance, the owner of the original title may show that such deed issued without payment of a certain tax-lieu, and was therefore void: *Hughes v. Jordan*, 118 Mich. 27. An *ex parte* order directing a writ to the sheriff to place in possession the tax-sale adjudicatee is no ground for a plea

sary before bringing suit,¹ but if the statute requires the service of written notice by the tax-purchaser on the adverse claimant for a certain length of time before instituting proceedings to recover, the notice is a condition precedent, and the giving of it must be proved by competent common-law evidence.²

Special rule for tax cases. It has in some states been thought proper to restrict the right to contest a tax-title to such persons as can show an apparent title in themselves derived either from the state or from the United States.³ How far it is competent for the legislature to impose such a restriction,⁴ it is perhaps not important now to inquire, as a title presumptively derived from the state or the United States is shown when a *prima facie* case sufficient under common-law rules is made out, and the right to make the contest under the

of *res judicata* as to the ownership of the property under the tax proceeding: *Welch v. Augusti*, 52 La. An. 1949.

¹ But in Wisconsin the tax-deed must first be recorded: *Hewitt v. Butterfield*, 52 Wis. 384; *Hewitt v. Week*, 59 Wis. 444. Probably this is the rule in some other states. And doubtless in any state it would be held essential that it be executed with the statutory formalities: see *Bowen v. Striker*, 100 Ind. 45.

² *People v. Walsh*, 87 N. Y. 481.

³ See *McArthur v. Peacock*, 93 Ga. 715; *Varnum v. Shuler*, 69 Iowa 92; *Wilkinson v. Hiller*, 71 Miss. 678; *Edwards v. Lyman*, 122 N. C. 741; *Hawkinberry v. Snodgrass*, 39 W. Va. 332. The Iowa statute on this subject applies to a suit by the state to quiet title to land claimed by defendant under tax-deeds regular on their face: *Wadleigh v. Marathon County Bank*, 58 Wis. 546. As to what is a showing of title, see *Pitts v. Seavey*, 88 Iowa 336; *Baird v. Law*, 93 Iowa 742. Possession under a void deed is not evidence of title: *Baird v. Law*, *supra*. Title for this purpose may be based on an adverse possession

against a grantee of the state who has complied with all the conditions entitling him to a patent, though the patent was not issued until just prior to the tax-sale: *Shelley v. Smith*, 97 Iowa 259. The fact that both parties in ejectment claim under the state through successive tax-titles cannot preclude either from denying the validity of the other's deed: *Wadleigh v. Marathon County Bank*, *supra*. In Louisiana a tax-title cannot be assailed collaterally by one claiming under a mortgage from the former owner, but only in a direct suit for the purpose: *Ludeling v. McGuire*, 35 La. An. 893, citing *Coco v. Thieneman*, 25 La. An. 237; *Hickman v. Dawson*, 33 La. An. 441, and other cases. Nor can a creditor of the former owner attack it collaterally if the tax-purchaser is in possession: *Ludeling v. McGuire*, *supra*. Under the Kansas statute there can be no collateral attack because of any supposed irregularity not affecting the jurisdiction: *English v. Woodman*, 40 Kan. 412; *McGregor v. Morrow*, 40 Kan. 730.

⁴ Held constitutional in *Moore v. Byrd*, 118 N. C. 688.

statute is thereby established.¹ Sometimes also it has been deemed wise to prohibit persons from questioning the title conferred by the tax-deed without first showing that all taxes imposed on the land have been paid by him or by some one under whom he claims.²

Repayment to purchaser. It has also been sometimes thought politic and just to impose upon the owner of the original title an obligation to do what is equitable under the circumstances as a condition either to the institution of any suit as plaintiff for the recovery of the land or to any judgment in his favor grounded on the invalidity of the tax-title. One of these, im-

¹ *Hintrager v. Kline*, 62 Iowa 605; *Callanan v. Wayne County*, 73 Iowa 709; *Gamble v. Horr*, 40 Mich. 561. In a suit to confirm a tax-title the question whether a patent from the United States was not void for fraud cannot be gone into: *Chrisman v. Currie*, 60 Miss. 858. A patent from the state to a county is sufficient *prima facie* evidence of the county's title to enable it to question a tax-title. The county need not put in evidence the patent from the United States to the state: *Callanan v. Wayne County*, 73 Iowa 709. Title under a tax-deed suffices to enable its holder to question the right of one claiming under a subsequent tax-deed: *McQuitty v. Doudna*, 101 Iowa 144. But one cannot resist a tax-title by showing that he held a tax-certificate to the land in controversy at the time of the tax-sale upon which such title is based: *Johns v. Griffin*, 76 Iowa 418. In Illinois, under a statute providing that "no person shall be permitted to question the title acquired by a sheriff's deed without first showing that he or she, or the person under whom he or she claims title, had title to the land at the time of the sale, or that the title was obtained from the United States or this state after the sale," it has been decided that if one was in possession of the land claiming title when the sale was made, that is sufficient evidence of title: *Lusk v. Harber*, 8 Ill. 158; *Curry v. Hinman*, 11 Ill. 420.

² See *Townsend v. Edwards*, 25 Fla. 582; *Maxwell v. Palmer*, 73 Iowa 595; *Cahalan v. Van Sant*, 87 Iowa 593; *William v. Wilkin*, 91 Iowa 652; *Edwards v. Lyman*, 122 N. C. 741; *Henrietta v. Eustis*, 87 Tex. 14. Such a requirement refers only to taxes lawfully assessed upon the land itself: *Lufkin v. Galveston*, 73 Tex. 340. The requirement held constitutional: *Moore v. Byrd*, 118 N. C. 688. It has been decided in Illinois that the tax-title may be contested if the taxes due to the state have been paid, no matter by whom: *Curry v. Hinman*, 11 Ill. 420. See *Conway v. Cable*, 37 Ill. 82. In Wisconsin it is held that the requirement of payment of the tax before the original owner can contest the tax-title can only be applied to cases where the tax is irregular, and not to those where the objections go to the groundwork of the tax: *Philleo v. Hiles*, 42 Wis. 527; *Marsh v. Supervisors*, 42 Wis. 502; *Plumer v. Supervisors*, 46 Wis. 163; *Tierney v. Lumbering Co.*, 47 Wis. 248. To the same effect, *Brooks v. Vernon Tp* (N. J.), 52 Atl. Rep. 238.

posed in some states, is that, before instituting suit, the original owner shall bring into court, for conditional payment to the tax-purchaser in case his title shall be held invalid, the amount for which the land was sold, with interest.¹ Generally it is required also that some further sum shall be added which will be in the nature of a penalty for failure to pay the tax in due season.²

It has been decided in one case that an act which provided that "no person shall be permitted to institute any proceedings to set aside any assessment or special tax, hereafter levied or assessed upon any lot or tract of land, or to set aside any deed executed in consequence of non-payment of such taxes, and the sale of the premises therefor, unless such person shall first pay

¹ See *McMillan v. Hogan*, 129 N. C. 314; *McClain v. Batton*, 50 W. Va. 121. In ejectment by the owner of land against one claiming under a void or voidable tax-deed it need not be shown that plaintiff has tendered the taxes, as this may be adjusted at the time of the judgment: *West v. Cameron*, 39 Kan. 736. In *Merritt v. Corey* (Wash.), 61 Pac. Rep. 171, it was held error to permit plaintiff to amend his pleadings to show tender, after commencement of suit, of the amount of taxes paid by the tax-sale purchaser. An owner of land who has paid the taxes before sale need not, before bringing ejectment, file an affidavit of tender of the amount of taxes and costs, as such tax-sale is void: *Kelso v. Robertson*, 51 Ark. 397. Where a tax-deed is void because of insufficiency of description, the owner in an action by the holder of such deed need not tender taxes paid by plaintiff: *Jory v. Palace Dry-Goods, etc. Co.*, 30 Or. 196. A statute requiring tender or payment of taxes, etc., before action to recover lands sold and conveyed for non-payment must be confined to cases where plaintiff concedes the validity of the tax, or a part thereof, and neither tender nor payment is necessary in a suit where the legal-

ity of the entire tax is controverted in good faith: *O'Neil v. Tyler*, 3 N. D. 47. Such a statute has no application to an action brought to determine the validity of a tax where no deed, but only a certificate of sale, has been executed to the purchaser: *Bode v. New England Inv. Co.*, 6 Dak. 499. Where the holder of an invalid tax-deed and his grantors have paid no money or taxes, the person entitled to have the deed set aside need make no tender before attacking it: *Collins v. Sherwood*, 50 W. Va. 133. Where affirmative relief is not sought—as in a suit for partition by the holder of a tax-title—the owner of the patent title who pleads in bar a former adjudication declaring the tax-title invalid should not be required to refund the taxes paid by complainant: *Thomson v. McCormick*, 136 Ill. 135.

² Where a sale of taxes is illegal, but no tender of taxes is made to the purchaser until after the time for redemption has expired and deed has issued, the purchaser is entitled to the penalty provided by law; where, however, tender is made before the expiration of the time for redemption, the purchaser is not entitled to the penalty: *Michigan Mut. L. Ins. Co. v. Kroh*, 102 Ind. 515.

or tender to the proper party, or deposit for his use with the treasurer, the amount of all state, county, and city taxes that may remain unpaid upon such lot or tract, together with the interest and charges thereon," was void as being inconsistent with that clause in the constitution that declares that every person "ought to obtain justice freely and without purchase."¹ If this statute were confined to the requirement of a payment or tender of legal taxes and costs for which the sale may have been made, the soundness of the conclusion might well be made a question. No one is denied a remedy in the courts when he is merely required to submit to a condition which, under the circumstances, is reasonable. Conditions to the assertion of a right in court are imposed in many cases, none of which is supposed to work to the detriment of justice. The requirement of security from a plaintiff in replevin or attachment is an instance, and the payment of taxes upon the legal process or upon the entry of the suit is another. Courts of equity, on general principles of right, are frequently in the habit of imposing conditions where one seeks in equity to restrain a tax, only a part of which is illegal. The authority of the legislature over the whole subject of legal remedies is very ample, and it is not to be supposed that any general declaration of the right of the citizen to his day in court was intended to preclude the legislature from exercising its authority to require him to do equity when he did come. Other cases have distinctly affirmed the right to require payment of the taxes as a condition precedent to a recovery of the land from the tax-purchaser, when it was proposed to do so on the ground of the invalidity of the tax-proceedings.²

¹ Conway v. Cable, 37 Ill. 82. It was held in Eustis v. Henrietta, 90 Tex. 468, that a statute requiring payment of taxes as a condition precedent to making defense to a void tax-deed is unconstitutional. In Mendenhall v. Hall, 134 U. S. 559, the provision of the constitution of Louisiana that tax-titles are *prima facie* valid and cannot be set aside without a previous tender to the purchaser of the price and ten per cent. interest thereon was held not to apply where suit is brought to en-

force the lien of a mortgage as against a tax-title claimed to have been acquired, after execution of the mortgage, by the mortgager's brother in collusion with the mortgagee. It was held in Hoffman v. Groll, 35 Kan. 652, that when, in an action to foreclose a mortgage, a tax-deed is set up to cut off the mortgage lien, the mortgagee, without tendering taxes paid, may question the validity of such deed. To the same effect is Mather v. Darst, 13 S. D. 75.

² Craig v. Flanagan, 21 Ark. 319;

These decisions, if limited in their application to cases in which taxes were justly and equitably a charge upon the land, and only failed to become a legal charge by reason of the negligence or mistakes of officers in the discharge of their duties

Pope v. Macon, 23 Ark. 644; *Tharp v. Hart*, 2 Sneed 569; *Glass v. White*, 5 Sneed 475; *Coonrad v. Myers*, 31 Kan. 30; *Belz v. Bird*, 31 Kan. 139; *Schoonover v. Galernault*, 45 Minn. 174; *Lombard v. Antioch College*, 60 Wis. 459; *Wisconsin Central R. Co. v. Comstock*, 71 Wis. 88; *Lombard v. McMillan*, 95 Wis. 627. Compare *Wakely v. Nicholas*, 16 Wis. 588. A constitutional provision that "appeals and writs of error shall be allowed from the final determination of county courts as may be allowed by law" is not violated by a statute which, in tax cases, requires the appellant to deposit with the county treasurer the amount of the judgment: *Andrews v. Rumsay*, 75 Ill. 598. An Illinois statute requiring a judgment setting aside a tax-deed to provide that taxes and costs paid by the holder of such deed should be repaid him was held to relate only to suits in equity to set aside tax-deeds, and not to actions of ejectment against their holders. In such actions the court cannot render such conditional judgments: *Riverside Co. v. Townshend*, 120 Ill. 9. It was decided in *Henderson v. Staritt*, 4 Sneed 170, that the plaintiff in ejectment to recover land sold for taxes may show that any necessary proceeding subsequent to the judgment and order of sale, such as the advertisement of the sale itself, was irregular and void, without first being required to show that the taxes had been paid anterior to such judgment and order of sale. A statute precluding the owner from contesting a tax-sale unless he has paid or tendered the taxes cannot be extended by construction to embrace the case of

lands forfeited to the state: *Williamsburg v. Lord*, 51 Me. 599. Nor can it be applied to a case where the owner, before the tax-sale, went to the proper officer with his list of lands and paid all taxes except one road-tax, which, by the officer's mistake, was not included: *Breisch v. Coxe*, 81 Pa. St. 336. The following are some of the cases in which repayment of the taxes has been required as a condition to recovery or continued possession of the land where a tax-deed has been held invalid: *Crisman v. Johnson*, 23 Colo. 264; *Ritchie v. Mulvane*, 39 Kan. 241; *Davenport v. Sadler*, 48 Kan. 311; *Standard Inv. Co. v. Freeman (Kan.)*, 67 Pac. Rep. 859; *Booge v. Ritchie*, 2 Kan. App. 714; *Genella v. Vincent*, 50 La. An. 956; *Allen v. Buckley*, 94 Mo. 158; *Bingham v. Birmingham*, 103 Mo. 345; *Pitkin v. Reibel*, 104 Mo. 505, 106 Mo. 571; *Farrington v. New England Inv. Co.*, 1 N. D. 102. In *Brummell v. Crook*, 119 Ala. 670, where a recovery in ejectment brought for a quarter lot in reliance upon a tax-title to the whole lot was defeated for other reasons than that the taxes were not due, it was held that the court properly apportioned and ascertained the value of the taxes on the quarter lot. In these cases it is not proper for the court to inquire into the correctness of the assessed valuation of the land for the purpose of showing the amount of taxes justly chargeable thereon, and to reduce the amount of taxes recoverable by the holder of the invalid tax-deed: *Booge v. Ritchie*, 2 Kan. App. 714. Under the Wisconsin statute a finding in ejectment that plaintiff is entitled to recover

under the tax-law, may fairly be said to rest upon sound reasons of broad equity, and to be supported on the same grounds which support remedial laws in general. If the tax-purchaser has, by his purchase, paid a charge which the state might fairly and justly make a legal one upon the land, and which the owner of the land ought himself to have paid to the state, there is no reason why the state should not give to the purchaser, when he loses the expected benefit of the purchase, a remedy to recover the amount of the tax from the party who ought to have paid it. This is the province of remedial laws: to give new remedies where none at all or only inadequate remedies existed before. And so favorably are such laws regarded that they always receive at the hands of the courts a favorable construction.¹

by reason of a defect in or insufficiency of a tax-deed under which defendant claims title is essential to make payment by plaintiff of the taxes therein mentioned a condition precedent to a judgment in his favor: *Geisenger v. Beyl*, 71 Wis. 358. Sufficient finding of amount of taxes paid by defeated party: *Coonrad v. Myers*, 32 Kan. 270. Under the laws of many of the states taxes paid since the sale are recoverable: see *Walsh v. Harang*, 48 La. An. 984; *Schoonover v. Galernault*, 45 Minn. 174; *Pitkin v. Reibel*, 104 Mo. 505, 106 Mo. 571. But not unless they are shown to be valid: *O'Neil v. Tyler*, 3 N. D. 47. Offer of reimbursement refused before suit, court's failure to render judgment against the land for taxes paid held not error: *Wheeler v. Bramel* (Ky.), 8 S. W. Rep. 199. In *Zimmerman v. Chicago G. W. R. Co.*, 156 Mo. 561, it was held that a right to recover taxes from the issue of deed until suit in ejectment, as alternative relief in case of the failure of the tax-title, is not barred by limitations if the right of ejectment is not barred. The holder of the tax-deed is entitled to retain possession of the land until the suc-

cessful claimant pays the taxes, etc., as required by the court's judgment: *Rose v. Newman*, 27 Pac. Rep. 181. Where the defendant in an action to recover land claims under a tax-sale which is void for insufficient description of the land sold, he cannot recover for taxes voluntarily paid by him: *Braxon v. McDougal*, 70 Tex. 64. It has been held in Missouri that, if one without color of title pays taxes on land, the owner cannot be compelled, as a condition to recovery of possession from him, to refund the amount paid: *Napton v. Leaton*, 71 Mo. 358. And in Minnesota, where a person in possession of land claiming title adversely to the true owner pays the taxes thereon, he cannot, after suffering judgment of ouster, recover the amount so paid in a personal action against the prevailing party: *Scharffbillig v. Scharffbillig*, 51 Minn. 349. A decree settling the title to land in the original holder as against a tax-purchaser does not bar an action to recover taxes paid by the latter in good faith upon the land in controversy: *Stewart v. Corbin*, 38 Iowa 571.

¹ A statute provided that the holder of a tax-title should not be entitled

But if the tax itself were vicious; if it were laid for a private and not a public purpose; if it were a special and arbitrary exaction from one person while the rest of the community equally interested was not taxed at all, or if for any similar reason the charge was not just and equitable as against the owner of the land or the land itself, so that the legislature could not have validated it retrospectively by a direct enactment, it is not perceived on what grounds an authority to validate it by this indirect and circuitous method can be supported. The legislature can have no more authority to compel the land-owner to pay a lawless exaction to a third person than it has to compel a like payment to the state directly. The one as much as the other would be robbery. If the land-owner performs all his duty to the state, nothing which the tax-officers can do without his consent, and in the direction of depriving him of his freehold, can raise against him an equity requiring him to do more. The rule *caveat emptor* applies to the purchaser. He takes all the risks of his purchase, and if he finds in any case that he has secured neither the title he bid for nor any equitable claim against the owner, the state may, if it see fit, make reparation itself; but it has no more authority to compel the owner of the land to do so than to exercise the like compulsion against any other person.¹

What is said above regarding lawless exactions is applicable in full force to a case in which the sum demanded may be lawful in part, but is swelled by unjust and illegal additions.²

to possession as against the holder of a subsequent tax-deed until he should have paid or tendered to the latter the amount of tax for which the subsequent deed was given. *Held*, that the subsequent title intended was not necessarily a legal title, though the tax on which it was based must not have been one that was merely arbitrary, but have some warrant in law. Payment of an arbitrary amount could not be coerced in this indirect way: *Sinclair v. Learned*, 51 Mich. 335. The holder of a tax-deed invalid because of an omission in the notice of the sale can recover only the amount actually paid by him, with interest: *Hoffman v. Grall*, 35

Kan. 652. See *Hentig v. Redden*, 45 Kan. 20.

¹ *McCann v. Smith*, 65 Ark. 305; *West v. Cameron*, 39 Kan. 736; *Burke v. Brown*, 148 Mo. 309. This is the substance of the decision in *Hart v. Henderson*, 17 Mich. 218. It is difficult to perceive how any equitable claim can exist against any one for the cost of void proceedings: see *Sinclair v. Learned*, 51 Mich. 335.

² A provision that, before any person claiming title to real property sold for taxes shall be entitled to prosecute or defend any suit against any person claiming such property under any tax-sale, he shall deposit double the purchase-money, and all taxes

Payments for betterments. Another common provision is that the owner of the original title, in the event of his establishing his title to the land, shall pay to the tax-purchaser the enhanced value of the land in consequence of the expenditures the latter has made upon it. The requirement that payment shall be made of the fair value of betterments which an adverse claimant has made in good faith upon the land, and which the party making them must now lose, is one that, under ordinary circumstances, is eminently just and proper. No serious question of the right of the legislature to make such requirements can well arise, and, if it could, it must now be considered as conclusively settled by the decisions in its favor. The requirement is at this time very generally made.¹ On the other

and interest since sale, the value of improvements and probable costs of suit, is an unreasonable condition attached to the right to suit and is therefore unconstitutional: *Lasseter v. Lee*, 68 Ala. 287.

¹*Flynn v. Edwards*, 36 Fed. Rep. 873; *Craig v. Flanagan*, 21 Ark. 319; *Pope v. Macon*, 23 Ark. 644; *Marlow v. Adams*, 24 Ark. 109; *Haney v. Cole*, 28 Ark. 299; *State v. Hicks*, 53 Ark. 238; *McCann v. Smith*, 65 Ark. 305; *Love v. Shartzer*, 31 Cal. 487; *Clemis v. Hartman*, 71 Ga. 810; *Gilbreath v. Dilday*, 152 Ill. 207; *Armstrong v. Jackson*, 1 Blatchf. 374; *Fish v. Blasser*, 146 Ind. 186; *Childs v. Shower*, 18 Iowa 261; *Stebbins v. Guthrie*, 4 Kan. 353; *Smith v. Smith*, 15 Kan. 290; *Fowler v. Halbort*, 4 Bibb 52; *Howard v. Zeyer*, 18 La. An. 407; *West v. Negrotto*, 52 La. An. 381; *Bracket v. Norcross*, 1 Me. 89, 92; *Bacon v. Callender*, 6 Mass. 303; *Jones v. Carter*, 12 Mass. 314; *King v. Harrington*, 18 Mich. 213; *Tillotson v. Saginaw Circuit Judge*, 97 Mich. 585; *Croskerry v. Busch*, 116 Mich. 288; *Jewell v. Truhn*, 38 Minn. 433; *Dothage v. Stuart*, 35 Mo. 251; *Fenwick v. Gill*, 38 Mo. 510; *Withington v. Corey*, 2 N. H. 115; *Hunt's Lessee v. McMahan*, 5 Ohio 133; *Longworth v. Wolfington*, 6

Ohio 9, 10; *Coney v. Owen*, 6 Watts 435; *Steele v. Spruance*, 22 Pa. St. 256; *Lynch v. Brudie*, 63 Pa. St. 206; *Strother v. Reilly*, 105 Tenn. 48; *Scott v. Mather*, 14 Tex. 235; *Saunders v. Wilson*, 19 Tex. 194; *Brown v. Storm*, 4 Vt. 37; *Whitney v. Richardson*, 31 Vt. 300, 306; *Pacquette v. Pickness*, 19 Wis. 219; *Hunt v. Stinson*, 101 Wis. 556. Some of the statutes give the value of the improvements to those only who have been in possession, claiming title in good faith. As to sufficient evidence of possession, see *Croskerry v. Busch*, 116 Mich. 288. In Texas it has been held that the tax-purchaser is not a possessor in good faith, and, consequently, not entitled to compensation for improvements, if his deed was void for want of authority in the officer to sell, and by proper diligence he might have known the fact: *Robson v. Osborn*, 13 Tex. 298, 307. But in that state it is also held that although the irregularities in the assessment and proceedings incident to a sale of lands for taxes were such as to be apparent to the eyes of a lawyer, it would not necessarily follow that the purchaser might not have deemed the law complied with and have supposed the tax-title good, and so be entitled on redemption to

hand it is generally required that the defeated tax-purchaser account for rents and profits received by him.¹

demand, as a *bona fide* purchaser, the value of improvements put by him on the land: *House v. Stone*, 64 Tex. 677. And in Texas a tax-deed which is void on its face has been held admissible as evidence for a defendant sued in trespass to try title in support of a plea of improvements in good faith: *Schleicher v. Gatlin*, 85 Tex. 270. In Indiana the claimant must at least have had color of title: *Cain v. Hunt*, 41 Ind. 466. However, in that state if one claiming under a tax-deed has made permanent improvements he will be presumed, until the contrary is shown, to have made them in good faith: *Hilgenberg v. Northup*, 134 Ind. 92; *Fish v. Blasser*, 146 Ind. 186. But he would not be entitled to the value of improvements made after acquiring knowledge that his deed conveyed no title to him: *Hilgenberg v. Rhodes*, 111 Ind. 167. In Missouri the good faith of a tax-sale purchaser is not affected by the constructive notice afforded by a recorded deed of trust on the property, and he is entitled to the value of permanent improvements made in good faith: *Boatmen's Sav. Bank v. Grieve*, 101 Mo. 625. In Louisiana, where the papers on a tax-sale show *prima facie* title, the purchaser is

not a possessor in bad faith, although thereafter title is found void: *West v. Negrotto*, 52 La. An. 381. See, also, *Font v. Improvement Co.*, 47 La. An. 275; *Foreman v. Hinchcliffe*, 106 La. 225. In Arkansas one who buys a homestead at a tax-sale is not entitled to the value of improvements made thereon after tender by a minor heir of the amount of taxes paid and value of improvements made prior thereto, although the materials for such improvements had already been purchased and the work commenced: *Seger v. Spurlock*, 59 Ark. 147. In Michigan a person entering into possession without giving the required notice to the person in interest cannot recover the value of his improvements in a proceeding to vacate the decree under which he purchased: *Corrigan v. Hinkley*, 125 Mich. 125. In Pennsylvania, and, indeed, in many other states, the owner recovering his lands will be adjudged to pay for improvements, though the tax proceedings were wholly void: *Gilmore v. Thompson*, 3 Watts 106 (where the tax had been paid before sale); *Coney v. Owen*, 6 Watts 435 (where the land was exempt from taxation); *Lynch v. Brudie*, 63 Pa. St. 206. See *Zweitusch v. Watkins*, 61 Wis. 615;

¹ *Will v. Ritchie*, 61 Kan. 715, limiting *Uhl v. Small*, 54 Kan. 651. A defeated tax-sale purchaser is not chargeable with the rents during his occupancy, when it appears that the premises had no rental value until he in good faith improved them: *Boatmen's Sav. Bank v. Grieve*, 101 Mo. 625. Nor is he liable for rents and profits where he did not take possession of the land, but allowed the owner or his lessees to remain in possession: *Columbia Bank v. Jones*

(N. J. Eq.), 17 Atl. Rep. 808. Not being in bad faith up to the time of the judicial demand for the premises, the tax-purchaser is liable for rents and revenues from that date only: *Foreman v. Hinchcliffe*, 106 La. 225. One in possession of land under a void tax-deed is entitled, in an accounting for rents and profits, to credit for reasonable and beneficial improvements made by him: *Gilbreath v. Dilday*, 152 Ill. 207.

Short statutes of limitation. It has also been thought wise in some states to prescribe a short time within which actions may be brought by owners of the original title to test the validity of the tax-deed, and to bar them of all remedy if the time

Hickman v. Dawson, 35 La. An. 1086, citing several cases. But it would be otherwise if the lands were seated so that the sale would be void, not because of defective proceedings, but because of the absence of jurisdiction to proceed at all. See Lambertson v. Hogan, 2 Pa. St. 22, and cases cited. In Rogers v. Johnson, 67 Pa. St. 43, 47, Agnew, J., gives the explanation of the difference: "The distinction between a sale absolutely void from want of jurisdiction to sell and one merely void because of a fatal defect in the proceedings is palpable. Thus, in McKee v. Lambertson, 2 W. & S. 107, 114, and Cranmer v. Hall, 4 W. & S. 36, where the land was seated and the treasurer had no authority to sell, it was held that the purchaser was not entitled to be compensated for his improvements; while in Coney v. Owen, 6 Watts 435, and Gilmore v. Thompson, 3 Watts 106, where the lands were unseated and the treasurer had general jurisdiction, but the sales were void because, in the first place, of exemption from taxation, and in the second because of a prior payment of the taxes, the purchaser was held to be entitled to his improvements. There are other cases, even where the irregularity has deprived the owner of his surplus bond, where the sales have been sustained. Thus, the sales were supported in Gibson v. Robbins, 9 Watts 156, where the treasurer charged too much costs and appropriated the whole bid, where a surplus would have existed for which a bond should have been taken; and in Peters v. Heasley, 10 Watts 208, and Russell v. Reed, 27 Pa. St. 166, where

the commissioners of the county bid more than the taxes and costs, and the owner was thereby deprived of his security for the surplus. So, also, the sale was supported in Frick v. Sterrett, 4 W. & S. 269, where the treasurer, by mistake, took the bond for less than the true surplus. To these cases may be added Bayard v. Inglis, 5 W. & S. 465, and Burd v. Patterson, 22 Pa. St. 219, where no bonds were given when the sale was made and deed delivered. In the former the bond was not given until nearly two years afterwards, and it never was filed." As to what constitutes permanent improvements within the meaning of the Wisconsin statute allowing recovery for improvements made in good faith by persons holding under tax-deeds, see Hunt v. Stinson, 101 Wis. 556. Recovery cannot be had for betterments made before the tax-title accrued: Jacks v. Dyer, 31 Ark. 334; Wheeler v. Merriman, 30 Minn. 372. Nor for those which were made only in part under the tax-title: Sands v. Davis, 40 Mich. 14. Nor, if improvements were made while the land belonged to the federal government, can a purchaser from the United States be required to pay for them: Gaither v. Lawson, 31 Ark. 279. It was held in Croskerry v. Busch, 116 Mich. 228, that the dispossession of a claimant under a void tax-deed need not be by suit in order to entitle him to compensation for improvements. In Sanborn v. Mueller, 38 Minn. 27, it was held not error to refuse to allow the value of improvements made by a defendant against whom the plaintiff did not seek to recover possession, but merely

is suffered to elapse without suit. Such statutes are enacted under the sovereign power of the state to limit within reasonable bounds the time for which its courts shall remain open for the adjustment of controversies, and when the time is not unreasonably short they are grounded in sound policy. But, like every other power of government, the power to limit the time for bringing suits is not altogether arbitrary and unrestricted, and it is not unlikely that it will be found to have been in some cases exceeded in the enactment of laws not warranted by constitutional principles.¹

The most common limitation of time for actions for the recovery of land is twenty years from the time when the right of action accrued, and the right of action at the common law accrues when adverse possession begins. But this period the legislature has undoubted right to shorten, either generally as to all classes of cases or specially as to some classes, as in its wisdom shall be deemed just and politic. Having this authority, it has in some cases been persuaded so to exercise it for the special class of land controversies in which tax-titles are brought in question, as to reduce the time for contesting the validity of a tax-title to five years, or even to a still shorter period. The statutes to this effect have not always been couched in the ordinary terms of statutes of limitation; they have not been simply statutes limiting a time for the bringing of suits after cause of action has accrued, but if literally interpreted they have seemed to fix a time after the lapse of which, irrespective of possession or other circumstance, the tax-title should be deemed legal and not be open to question. This feature of such statutes has raised serious doubts whether

to determine the validity of the tax-titles under which defendant claimed. In *Collins v. Storm*, 75 Iowa 36, it was decided that the question as to improvements made by a person claiming under a tax-deed could not be adjudicated in an action to quiet title against him, the case not being governed by the Iowa statute providing for the determination of such a question in an equitable action for redemption.

¹ *Thomas v. Stickle*, 32 Iowa 71

(citing *Henderson v. Oliver*, 28 Iowa 20; *Eldridge v. Kuehl*, 27 Iowa 160); *Barrow v. Wilson*, 39 La. An. 403; *Russell v. Lang*, 50 La. An. 36; *Shiek v. McElroy*, 20 Pa. St. 25; *Edgerton v. Bird*, 6 Wis. 527, 532; *Sprecher v. Wakeley*, 11 Wis. 432. The short statute of limitation can have no application in a case in which, though a tax-deed was given, no tax in fact was laid: *Florida Sav. Bank v. Brittain*, 20 Fla. 507.

the legislature in adopting it has not exceeded its constitutional power. The short period of limitation it is entirely competent for the legislature to prescribe;¹ but it may be questioned whether an act which merely limits a time within which a bad title may ripen into a good one is, either in spirit, purpose, or effect, an act in the nature of an act of limitation.

Three different classes of cases may be affected by such statutes: 1. Those in which the owner of the original title remains in possession after the tax-sale. 2. Those in which the land is then and remains afterward unoccupied. 3. Those in which the tax-purchaser enters and holds possession claiming title.

In the third class of cases there can be no sufficient reason why the holder of the original title should not be required to bring suit in a time less than twenty years. By the adverse possession he is excluded from the enjoyment of any right he may claim, and public policy no less than justice to the tax-purchaser requires that he should bring his suit within a reasonable time, in order that all contested questions may be put at rest while the facts are recent and presumably susceptible of proof. And it cannot be said that five years, or even two years, are not a reasonable time for the institution of such a suit.¹

In the first class of cases it would be manifest and most gross injustice to make lapse of time alone extinguish the title of the original owner. Being in the full possession of his rights, it is the adverse claimant and not himself who seems to be negligent in not bringing suit. And it is not surprising that, under such circumstances, question should be made whether it is competent to limit a period at the expiration of which the tax-title shall become a perfect title and not open to controversy or dispute.² If distinct notice were required to be given to the orig-

¹ For decisions sustaining short statutes of limitation where the purchaser has been in possession, see *Pillow v. Roberts*, 13 How. 472; *Lassiter v. Lee*, 68 Ala. 287; *Cofer v. Brooks*, 20 Ark. 542; *McConnell v. Swepston*, 66 Ala. 141; *Mundee v. Freeman*, 23 Fla. 529; *Vancleave v. Milliken*, 13 Ind. 105; *Doe v. Hearick*, 14 Ind. 242; *Sprague v. Pitt*, *McCahon* 212; *Bowman v. Cockrill*, 6 Kan. 311.

See *McNamara v. Estes*, 22 Iowa 246; *Eldredge v. Kuehl*, 27 Iowa 160; *Henderson v. Oliver*, 28 Iowa 20; *Albee's Case*, 28 Iowa 277; *McCready v. Sexton*, 29 Iowa 356; *Henley v. Street*, 29 Iowa 429; *Thomas v. Stickle*, 32 Iowa 71; *Douglass v. Tullock*, 34 Iowa 262; *Jeffrey v. Brokaw*, 35 Iowa 505; *De Graw v. Taylor*, 37 Mo. 310; *Pease v. Lawson*, 33 Mo. 35.

² *Groesbek v. Seeley*, 13 Mich. 329.

inal owner that title was claimed under the tax-deed, and a reasonable opportunity afforded for contesting the title in some convenient form of proceeding thereafter, there would be less reason for criticism of such a law; but the notice most commonly provided for is such constructive notice as is derived from the recording of the tax-deed; which notoriously is of little value.

In the second class of cases the proper rule is not so clear. If no provision is made by statute under which ejectment can be brought in the case of a vacant possession, it would seem that neither claimant could be considered in law negligent, so as to render his claim the proper subject of a statute of repose, until possession was taken by his adversary; but if ejectment is allowed in such cases, then it may possibly be within the power of the legislature to declare that the title of that one of the parties who, constructively, is to be regarded as in possession, shall become absolute if not questioned by suit within the time by the statute limited for that purpose.

In Alabama it is said that the purpose of the five years' statute of limitations is to give repose to the title of the tax-purchaser, if in possession, and to quiet all litigation if he is not in possession,¹ and the statute runs from the time the tax-deed is properly acknowledged and recorded.² The provision that no action for the recovery of real estate sold for taxes shall lie unless brought within three years from the date when the purchaser became entitled to a deed therefor does not apply where the original owner, whose duty it was to pay the taxes, redeems from the sale.³

Under the Arkansas statute limiting to two years the right to recover land from one who holds under a tax-deed, unless the plaintiff was seised or possessed of the land within two years next before the commencement of the action, continuous adverse possession for more than two years under an invalid tax-title gives the holder a valid title where the right to redeem does not exist.⁴ But the possession necessary to consti-

See *Conway v. Cable*, 37 Ill. 82; *Case v. Dean*, 16 Mich. 12; *Waln v. Shearman*, 8 S. & R. 357.

¹ *Pugh v. Youngblood*, 69 Ala. 296.

² *Jones v. Randle*, 68 Ala. 258; *Pugh*

v. Youngblood, 69 Ala. 296; *Flowers v. Jernigan*, 116 Ala. 516.

³ *Scott v. Brown*, 106 Ala. 604.

⁴ *Cooper v. Lee*, 59 Ark. 460; *Finley v. Hogan*, 60 Ark. 499; *McConnell v.*

tute a bar must be under the tax-deed; until that is executed the grantee therein can acquire no rights by adverse possession.¹ And mere lapse of time does not validate a tax-deed based on an illegal sale, where the purchaser does not take possession of the land, even though the deed is good upon its face and the purchaser has paid all subsequent taxes.² A statute providing that all actions to avoid a tax-sale for irregularity or neglect of any kind by any officer having anything to perform under the tax-act shall be commenced within two years from the date of sale does not prevent a defense, after the two years, to a suit in ejectment brought by the tax-purchaser;³ it should not be so construed as to cut off the original owner's right to object to fundamental defects, where he has remained in possession;⁴ it does not prevent the owner's showing irregularities which deprived him of a substantial right, and were actually prejudicial to him;⁵ and it begins to run from the day the property is stricken off at the tax-sale.⁶

In Colorado the statute does not run in favor of a tax-purchaser whose deed is void on its face,⁷ although an action for recovery based on the insufficiency of the notice of sale must be brought within five years.⁸ The provision that when the owner is a minor or insane at the time the deed is executed he may bring action to recover the lands one year after removal of disability applies only to an action by the prior owner whose title is sought to be divested by the tax-sale, and not to an action by the purchaser.⁹ And the five years' limitation of actions "for the recovery" of land sold for taxes

Swepton, 66 Ark. 141. See *Helena v. Hornor*, 58 Ark. 151. This is so though the tax-title is void on its face: *Woolfork v. Buckner*, 60 Ark. 163. See, however, *Alexander v. Gordon*, 41 C. C. A. 228. A tax-sale is not a "judicial sale," within the Arkansas statute declaring the period within which action shall be brought against the purchaser for the recovery of lands sold at judicial sale: *Worthen v. Fletcher*, 64 Ark. 662.

¹ *McGann v. Smith*, 65 Ark. 305; *Quertermous v. Walls* (Ark.), 67 S. W. Rep. 1014.

² *Parr v. Matthews*, 50 Ark. 390.

In Arkansas the holder of a tax-deed has no constructive possession which will cause the statute of limitations to run in his favor: *Woolfork v. Buckner*, 60 Ark. 163.

³ *Cairo, etc. R. Co. v. Parks*, 32 Ark. 131.

⁴ *Radcliffe v. Scruggs*, 46 Ark. 96.

⁵ *Martin v. Barbour*, 140 U. S. 634.

⁶ *Radcliffe v. Scruggs*, 46 Ark. 96.

⁷ *Gomer v. Chaffee*, 6 Colo. 314; *Crisman v. Johnson*, 23 Colo. 264. See *Geekie v. Kirby, etc. Co.*, 106 U. S. 379.

⁸ *Crisman v. Johnson*, 23 Colo. 264.

⁹ *Sullivan v. Collins*, 20 Colo. 528.

does not apply to an action by the original owner to remove a tax-deed as a cloud upon the title where the tax-claimant never has taken actual and adverse possession of the land.¹

It has been held in Florida that where there is legal evidence of an assessment, and where the land has been sold for taxes and the tax-deed duly recorded, statutory provisions limiting the grounds upon which a former owner or claimant may, after a year from the date of the deed, bring action to set aside the deed or to recover the land, are valid;² but in that state a short statute of limitations is not available in favor of a tax-purchaser whose deed is void because there was in fact no tax laid,³ or because the description therein differs materially from that in the assessment.⁴ As against the former owner the statute begins to run from the execution and delivery of the deed, and not from the day the land is struck off to the purchaser.⁵ A statute requiring one who has purchased land at a tax-sale prior to its passage, and who "has not entered into and taken actual possession," to bring suit therefor within one year, in default of which the tax-title shall become void, does not, as to land sold for taxes prior to the act, authorize the former owner to bring ejectment within the year against a purchaser who, after the taking effect of the act, has entered and taken possession without suit.⁶

In Indiana it has been decided that a statute fixing a five-year limitation should be construed strictly, and should not be

¹ Morris v. St. Louis Nat. Bank, 17 Colo. 231.

² Mundee v. Freeman, 23 Fla. 529. In ejectment based upon a tax-deed the defendant, after showing that the person to whom the assessment was in the deed recited to have been made was not the owner or in possession of the land at the time of the assessment, may introduce a prior tax-deed to a third person as tending to show who was owner when the assessment under which the plaintiff claims was made: Brown v. Castellow, 33 Fla. 204.

³ Florida Sav. Bank v. Brittain, 20 Fla. 507.

⁴ Bird v. Benlisa, 142 U. S. 664;

Carncross v. Lykes, 22 Fla. 587; McKeown v. Collins, 38 Fla. 276.

⁵ Spaulding v. Ellsworth, 39 Fla. 76.

⁶ Vail v. Richards, 62 Fed. Rep. 720, 10 C. C. A. 614. It was held in Graham v. Florida L. & M. Co., 33 Fla. 356, that recording a tax-deed which by statute is *prima facie* evidence of the regularity of the tax-proceedings, and bars suit by the former owner to set aside the sale unless commenced within three years after the deed is recorded, does not vest such possession of the land in the grantee as to require the former owner to sue at law for the recovery of land which is wild and unoccupied.

applied to an equitable action to quiet title claimed to be clouded by a tax-deed.¹ The statute does not bar an action when the deed under which the defendant claims to have occupied the land is not witnessed or recorded.² A purchaser who has been prevented by litigation from asserting his rights until after five years may then have relief in equity.³ And a statute of limitations relating to the foreclosure of liens for taxes does not apply to a defendant who asserts title as an occupying claimant.⁴

In Iowa a statute providing that no action for the recovery of land sold for taxes shall lie unless brought within five years after the tax-deed is executed and recorded begins to run as against the owner of the tax-title as soon as his right to a deed becomes complete, and he cannot by his own act prevent it;⁵ but as against the owner of the original title it dates from the recording of the tax-deed.⁶ Irregularities

¹ *Farrar v. Clark*, 85 Ind. 469; *Gabe v. Root*, 93 Ind. 256.

² *Jackson v. Neal*, 136 Ind. 173.

³ *Union, etc. Ins. Co. v. Dice*, 14 Fed. Rep. 523.

⁴ *Fish v. Blasser*, 146 Ind. 186.

⁵ *Hintrager v. Hennessy*, 46 Iowa 100; *Griffith v. Carter*, 64 Iowa 193; *La Rue v. King*, 74 Iowa 288; *Innes v. Drexel*, 78 Iowa 253; *Gallaher v. Head*, 108 Iowa 588. Otherwise if the land is not occupied—then the tax purchaser is deemed to have constructive possession, and his failure to take a deed when entitled to do so will not prevent the statute's running in his favor: *Griffin v. Turner*, 75 Iowa 250. As to what are sufficient acts of possession by the record-owner to bring the case within the statute, see *Forey v. Bigelow*, 56 Iowa 381; *Dorweiler v. Callanan*, 91 Iowa 299.

⁶ *Hintrager v. Hennessy*, 46 Iowa 600; *Kundson v. Litchfield*, 87 Iowa 111. See *Bailey v. Howard*, 55 Iowa 290; *Thornton v. Jones*, 47 Iowa 397; *Barrett v. Holmes*, 102 U. S. 651. The purchaser from a minor is allowed

five years from the date of his purchase in which to bring an action to recover the land as against the holder of the tax-title, but the latter has no extension of time by reason of the minor's disability: *McCaughan v. Tatman*, 53 Iowa 508. As to the disability of infancy, see *Gibbs v. Sawyer*, 48 Iowa 443. As to estoppel against former owner or his grantee from asserting title against persons who have been in possession for many years under tax-deeds, see *Mathews v. Culbertson*, 83 Iowa 434; *Pitts v. Seavey*, 88 Iowa 336. While equity will usually follow the statutes of limitation, it will not, in any case, cut off the rights of parties to relief within a time shorter than that prescribed by the statute for bringing actions at law, unless the other party is shown to have been prejudiced by delay in some manner, which would render it inequitable to grant the relief sought: *Light v. West*, 42 Iowa 138. The lapse of three years after the making of a tax-deed before suit brought by the owner to recover the land

in the assessment or in the subsequent proceedings will not preclude the five years' bar in favor of the tax-purchaser;¹ but if there is neither a valid assessment or levy, the statute has no application;² nor has it where the taxes for which the land was sold had in fact been paid;³ or where the deed was issued without notice to the occupant of the expiration of the time for redemption;⁴ or when the tax-title is held by agreement as security merely;⁵ or when the person against whom action is brought is a stranger to the patent title, and was not in possession when the tax-deed was made;⁶ or when the holder of the tax-title is tenant in common with the other party, and as such would not be entitled to cut off the right of the other by buying at a tax-sale.⁷ The statute runs against a city or county as well as against natural persons.⁸ Where the owner of a patent title has retained possession until the tax-purchaser is barred, he may bring suit in equity to remove the cloud upon his title;⁹ and the tax-purchaser, if in possession, has a corresponding right.¹⁰ An assignee has no

does not show laches on the owner's part sufficient to bar relief in equity: *Fuller v. Butler*, 72 Iowa 729.

¹ *Guthrie v. Harker*, 27 Fed. Rep. 586; *Slyfield v. Healy*, 32 Fed. Rep. 2; *Pierce v. Weare*, 41 Iowa 378; *Bullis v. Marsh*, 56 Iowa 747; *Monk v. Corbin*, 58 Iowa 503; *Trulock v. Bentley*, 67 Iowa 602; *Griffin v. Bruce*, 73 Iowa 126; *Collins v. Val-leau*, 79 Iowa 626; *Waggoner v. Mann*, 83 Iowa 17.

² *Early v. Whittingham*, 43 Iowa 162; *Patton v. Luther*, 47 Iowa 236. The holder of a tax-title acquires no title by adverse possession where the land taxed belonged to the United States: *Durham v. Hussman*, 88 Iowa 29.

³ *Rath v. Martin*, 93 Iowa 499.

⁴ *Shelley v. Smith*, 97 Iowa 259.

⁵ *Jordan v. Brown*, 56 Iowa 281.

⁶ *Lockridge v. Daggett*, 47 Iowa 679, 54 Iowa 332; *Knight v. Campbell*, 76 Iowa 730; *Gill v. Candler* (Iowa), 86 N. W. Rep. 300. One who is not shown to be the owner of land

cannot interpose the five-year statute as against one claiming under a tax-deed: *Schee v. La Grange*, 78 Iowa 101.

⁷ *Austin v. Barrett*, 44 Iowa 488. An action attacking the capacity of a trustee to acquire a tax-title adverse to the co-tenants of his *cestuis que trustent* is not within the five-year statute of limitations: *Soreson v. Davis*, 83 Iowa 405.

⁸ *Burlington v. Railroad Co.*, 41 Iowa 134; *Brown v. Painter*, 44 Iowa 368.

⁹ *Peck v. Sexton*, 41 Iowa 566; *Patton v. Luther*, 47 Iowa 236; *Tabler v. Callanan*, 49 Iowa 362. An action brought by the owner to quiet title more than five years after the execution of a tax-deed is not barred where such deed was given after redemption: *Burke v. Cutler*, 78 Iowa 299.

¹⁰ *Shawler v. Johnson*, 52 Iowa 492. The rule that the statute begins to run against the right of a holder of a tax-title to bring suit to quiet his

better right than his assignor; and a tenant or licensee in possession cannot, by becoming assignee of a tax-title already barred, make defense under it to a suit to quiet title.¹ The rule that the owner of the tax-title is deemed to be constructively in possession is applied in Iowa as well as in Wisconsin, and it is held that he need not bring action to vindicate his title until actual hostile possession is taken by another, and the bar of the statute will be complete in his favor after five years if such hostile possession is not taken.² But if actual possession is taken within the five years by the owner of the patent title, he will be deemed to have claimed title from the time the right of the tax-purchaser accrued, and the right of the latter will be barred when the five years are completed, as it would have been if the hostile possession had covered the whole period.³

In Kansas one out of possession claiming under a tax-deed must bring action within two years after the deed is recorded,⁴ and one out of possession holding the record title must bring action against the tax-purchaser within five years from the re-

title at the time when he is entitled to receive his deed does not apply where his title is not called in question: *Francis v. Griffin*, 72 Iowa 23. Where, in an action to quiet title, plaintiff relies on a tax-deed, and defendant fails to show title in himself, he cannot, under the five-year statute, defeat a recovery: *Baird v. Law*, 93 Iowa 742. And the defendant in such an action cannot defeat it on the ground that it was not brought within five years, without showing that he or his grantor was in possession at the end of the five years: *Maxwell v. Hunter*, 65 Iowa 121. As to what constitutes the commencement of an action to quiet title under a tax-deed, see *Hintrager v. Nightingale*, 36 Fed. Rep. 847.

¹ *Keokuk, etc. R. Co. v. Lindly*, 48 Iowa 11. And this notwithstanding any defects in the complainant's title: *Ibid.*

² *Moingona Coal Co. v. Blair*, 51 Iowa 447; *Lewis v. Soule*, 52 Iowa

11; *Gosler v. Tearney*, 52 Iowa 455; *McCaughan v. Tatman*, 53 Iowa 508; *Bullis v. Marsh*, 56 Iowa 747; *Monk v. Corbin*, 58 Iowa 503; *Rice v. Haddock*, 70 Iowa 318; *Dorweiler v. Callanan*, 91 Iowa 299.

³ *Barrett v. Love*, 48 Iowa 103; *McCaughan v. Tatman*, 53 Iowa 508.

⁴ See *Mitchell v. Lines*, 36 Kan. 378; *Smith v. Jones*, 37 Kan. 292; *Austin v. Jones*, 37 Kan. 327; *Campbell v. Stagg*, 37 Kan. 419. In several of these cases both parties claimed under tax-deeds. In *Estes v. Stebbins*, 25 Kan. 315, the holder of a tax-deed had delayed for eight years to record it, and the court held he then had two years in which to bring suit. Where land remains vacant five years after a tax-deed is recorded, and the holder of the original title then holds possession two years before suit is brought by the holder of the tax-title, the action is barred: *Coale v. Campbell*, 58 Kan. 480.

ording of the tax deed.¹ But the statute limiting the owner of the record title to five years is mandatory only when he is out of possession; it is permissive only as to one in possession, since the initiative in respect to litigation does not lie with him.² If the land is unoccupied during the two years from the recording of the tax-deed, and the owner of the record title takes possession afterwards, the tax-purchaser is not barred by the previous lapse of time.³ The statute will not apply in favor of the tax-title if the deed is void on its face,⁴ but a showing of irregularities will not defeat it if there was an actual sale;⁵ not even so serious an irregularity as that the description was fatally defective in the assessment roll and certificate of sale.⁶

¹ *Thornburgh v. Cole*, 27 Kan. 490. The statute has no application to a case where there was, before execution and delivery of the tax-deed, a tender of the full amount required to redeem the land sold: *Wilson v. Reasoner*, 37 Kan. 663. Nor does it apply to an action by the holder of a tax-deed to quiet his title against the original owner: *Walker v. Boh*, 32 Kan. 354. It was held in *West v. Cameron*, 39 Kan. 736, that the owner of land has five years after a tax-deed on it has been recorded to sue to avoid the deed. As to the limitation in the case of an insane person or an infant, see *Cartwright v. Korman*, 45 Kan. 515; *Goodman v. Wilson*, 54 Kan. 709; *Douglass v. Lowell*, 55 Kan. 574.

² *Myers v. Coonradt*, 28 Kan. 211.

³ *Myers v. Coonradt*, 28 Kan. 211.

⁴ *Waterson v. Devoe*, 18 Kan. 223. Where the tax-deed would be valid on its face if so construed as to make the facts stated therein correspond to the real facts of the case, such deed should be liberally construed: *Sanger v. Rice*, 43 Kan. 580.

⁵ *Jordan v. Kyle*, 27 Kan. 190; *Edwards v. Sims*, 40 Kan. 235; *Goddard v. Storch*, 57 Kan. 714. The statute of limitation runs in favor of a tax-deed made by the county clerk to

himself entitled thereto as an individual: *Barr v. Randall*, 35 Kan. 126. After a tax-deed has been recorded five years it is not subject to attack because the levy made by the county exceeded the amount authorized by law: *Doudna v. Harlan*, 45 Kan. 484.

⁶ *Maxson v. Huston*, 22 Kan. 643. "If the proceedings must be so regular as to make a valid sale before the statute of limitations will start to run upon a tax-deed good upon its face, then the statute would be of little value in these cases as a statute of repose, for upon a valid sale a valid deed can be compelled, and the statute will rarely be invoked except in cases where it is not needed." *Ibid.* See *Geekie v. Kirby, etc. Co.*, 106 U. S. 379, for the same ruling. The statute does not, however, preclude the owner of the record title from showing, in an action brought, more than five years after the record of the deed, to defeat the tax-sale, that the deed, contrary to its recitals, was prematurely executed before the expiration of the statutory six months from the assignment of the tax-sale certificate, and that within that time after such assignment he offered to redeem: *Noble v. Douglass*, 56 Kan. 92.

A Kentucky act providing that no action for the recovery of real estate sold for taxes shall be brought more than five years after sale thereof for taxes applies only where there has been a sale under its provisions.¹ And the statute does not begin to run on an illegal sale for taxes until after the deed has been recorded.²

In Louisiana two short statutes of limitation in favor of tax-sale purchasers are in force. One of these applies a five-year period of prescription to informalities in sale proceedings,³ but not to radical defects;⁴ the other provides that "any action to invalidate the title to any property purchased at tax-sale under or by virtue of any law of this state shall be prescribed by a lapse of three years from the date of such sale."⁵ The latter statute bars in three years from acquisition of title by the state an action to invalidate the state's title to land sold for taxes,⁶ and is said to be "a statute of repose, sanctioned alike by reason, sound policy, and authority."⁷ It applies only where the sale was made by virtue of some law, and not to cases where an inspection of the title shows that the sale was not made in conformity with any existing law.⁸ In order to avail himself of the prescription which it provides, the tax-sale purchaser must be in possession of the property,⁹ for the statute will not run as against a land-owner who has never been interrupted;¹⁰ but while actual possession by the tax-purchaser for three years precludes

¹ Packard v. Beaver Valley L. & M. Co., 96 Ky. 249.

² Washington v. McCombs (Ky.), 32 S. W. Rep. 398.

³ Roberts v. Zensler, 34 La. An. 205; Prescott v. Payne, 44 La. An. 650.

⁴ Davenport v. Knox, 34 La. An. 407; Wederstrandt v. Freyhan, 34 La. An. 705; Person v. O'Neal, 32 La. An. 228; Prescott v. Payne, 44 La. An. 650; Millaudon v. Gallagher, 104 La. 713. Errors of form in assessment, etc., cured: Kent v. Brown, 38 La. An. 802.

⁵ Barrow v. Wilson, 39 La. An. 403; McDougall v. Montlezun, 39 La. An. 1005.

⁶ Smith v. New Orleans, 43 La. An. 726.

⁷ Russell v. Lang, 50 La. An. 36.

⁸ Surget v. Newman, 42 La. An. 777; Prescott v. Payne, 44 La. An. 650. The prescription of three years cannot be sustained as a bar to an action to annul a tax-title which is absolutely null as founded on an illegal assessment and sale: Beltram v. Villeré (La.), 4 South. Rep. 506.

⁹ Breaux v. Negrotto, 43 La. An. 426. When possession by the tax-purchaser is shown, it puts the original owner under notice of the necessity of bringing his action, and if he fails to bring it within the prescribed time the bar of the statute applies: Ibid.; Russell v. Lang, 50 La. An. 36.

¹⁰ Land Trust v. Hoffman, 57 Fed. Rep. 333; Hansen v. Mauberret, 52 La. An. 1565.

an action to invalidate the tax-title, it does not bar an action to recover possession where the tax-title is radically null.¹ Neither the prescription of three nor that of five years cures the want of notice required by the fundamental law to be given the owner of an adjudication for taxes.² In this state a purchase in good faith at a sale made by the proper officer, evidenced by a deed, becomes valid after ten years' possession as owner;³ but the prescription of ten years cannot be maintained by one who has purchased land at a void tax-sale, unless his title was accompanied by possession during the ten years;⁴ and where the holder of a tax-title appears as plaintiff in a petitory action against the former owner in possession, he is bound to establish his title, and cannot overcome objections to it by the aid of prescription.⁵ The prescription in favor of tax-titles does not run against incapacitated persons.⁶

In Maryland a short statute of limitations for cases in which lands have been sold for taxes is held not applicable to the case of a sale for non-payment of an assessment for paving a street.⁷ In Michigan the short statute of limitations does not apply in favor of one who was in possession under another claim at the time of acquiring his tax-deed;⁸ but the provision that

¹ Welsch v. Augusti, 52 La. An. 1949; Pennington v. Jones, 52 La. An. 2025.

² Johnson v. Martinez, 48 La. An. 52, citing Barrow v. Wilson, 39 La. An. 403; Breaux v. Negrotto, 43 La. An. 428; Concordia Parish v. Bert-ron, 46 La. An. 356; Millaudon v. Gallagher, 104 La. 713; Foreman v. Hincheliffe, 106 La. 225.

³ Wickoff's Heirs v. Miller, 48 La. An. 475. Where a tax-deed is *prima facie* valid, defects not apparent on its face are cured by the prescription of ten years: Barrow v. Wilson, 38 La. An. 209. A holder without notice of defects of a tax-deed valid on its face is a *bona fide* holder, and entitled to the benefit of the ten years' prescription: Giddens v. Mobley, 37 La. An. 417. "Good faith purifies a title of its defects, and causes the possessor under a just title to be pre-

ferred to the true proprietor, who has remained so long silent and neglectful of his right:" Ibid., citing McCluskey v. Webb, 4 Rob. (La.) 205. A tax-adjudicatee who fails to pay the subsequent taxes assumed by him acquires no title, and if he takes possession of the property is a possessor in bad faith in whose favor the prescription of ten years does not run: Millaudon v. Gallagher, 104 La. 713.

⁴ Prescott v. Payne, 44 La. An. 650.

⁵ Waddill v. Walton, 42 La. An. 763.

⁶ Kerns v. Collins, 40 La. An. 453. See, as to the disability of infancy, Barrows v. Wilson, 39 La. An. 403.

⁷ Gould v. Baltimore, 59 Md. 378; Moore v. Baltimore, 61 Md. 224.

⁸ Gilman v. Riopelle, 18 Mich. 145. A person claiming under a tax-title is a proper party to an action of ejectment, though not in possession: Anderson v. Courtright, 47 Mich. 161.

ejectment for land held under a tax-deed is barred after ten years' adverse possession applies to a claim under a tax-deed conveying an undivided half, though not specifying which half;¹ and the grantee of a tax-sale purchaser can rely on ten years' adverse possession under his deed, although said purchaser had previously conveyed the land to another by warranty deed.²

The Minnesota statute providing for a limitation of nine months within which to bring any form of action to test the validity of a tax-judgment or sale is not set in motion by a sale under a void judgment rendered in proceedings to enforce payment of delinquent taxes.³

In Mississippi the running of the statute of limitations in favor of the original owner is not affected by the pendency of statutory proceedings by the tax-sale purchaser to confirm his title.⁴ A statute providing that suits to invalidate tax-sales must be brought within three years of the sale applied to all sales made while it was in force,⁵ even though the assessment was irregular and the sale invalid;⁶ but it does not apply where no title was derived from the sale,⁷ nor does it cure the failure of the tax-deed to identify the land.⁸ A provision that "actual occupation for three years after one year from the day of sale, of any land held under a conveyance by the tax-collector in pursuance of a sale for taxes, shall bar any suit to recover such land or assail such title because of any defect in the sale," applies as well to a purchaser of land held by the state for taxes as to a purchaser from a tax-collector.⁹ It renders

In Michigan title to land is acquired by adverse possession for twenty years under a void tax-title: *Harrison v. Spencer*, 90 Mich. 586. Assertion of title to warrant ejectment by holder of tax-title: *Goodman v. Nester*, 64 Mich. 602.

¹ *Chamberlain v. Ahrens*, 55 Mich. 111.

² *Reilly v. Blaser*, 61 Mich. 399.

³ *Feller v. Clark*, 36 Minn. 338. Such a statute confers vested rights on purchasers, and is not affected by a statute providing that any person claiming title to land may commence at any time an action against any

person who claims through a tax-deed "hereinafter or hereinbefore issued," to test the validity of the former sale or judgment, and repealing all former laws in conflict therewith: *Whitney v. Wegler*, 54 Minn. 235.

⁴ *Bell v. Coats*, 56 Miss. 766.

⁵ *Gilson v. Berry*, 66 Miss. 615.

⁶ *Nevin v. Bailey*, 62 Miss. 433; *Jonas v. Flanniken*, 69 Miss. 577; *Cole v. Coon*, 70 Miss. 634.

⁷ *Zingerling v. Henderson* (Miss.), 18 South. Rep. 432.

⁸ *Pearce v. Perkins*, 70 Miss. 276.

⁹ *Pipes v. Farrar*, 64 Miss. 514.

perfect the title of one so in occupation, regardless of the fact that the assessment roll under which the sale was made was not properly returned, or that the land was not subject to taxation and sale, and regardless of the fact, also, of actual payment of the taxes by the owner.¹ But it does not preclude a recovery by the true owner who can show a redemption of the land from the sale under which an actual occupant claims;² nor does it apply where the occupant could not, if his title were perfect, assert it against the plaintiff,³ or when the plaintiff does not attack the collector's deed to the defendant, but claims under a similar later deed.⁴ Under this provision an actual, continuous occupation of at least a part of the land is necessary.⁵ Under another provision to the effect that the purchaser of land at a tax-sale may within a specified time bring an action to recover possession, and that a judgment in his favor shall be a bar to any action to controvert the title, brought after one year from such judgment, it has been held that a recovery in such an action by such a purchaser makes his title unassailable on any ground after one year from the date of the judgment;⁶ and it is no defense to such an action that the land belonged to a decedent's estate in which minor heirs were interested.⁷

The Missouri statute requiring that "any suit . . . against the tax-purchaser, his heirs or assigns, for the recovery of the land sold for taxes, or to defeat or avoid a sale or conveyance of land for taxes, . . . shall be commenced within three years from the date of recording the tax-deed," except "where the taxes have been paid, or the land was not subject to taxation, or has been redeemed as provided by law," does not apply where the owner is in possession;⁸ but it is applicable where the holder of the tax-deed goes into actual possession of land previously wild, and action is not brought against him until after the three years.⁹ The statute begins to run in

¹ *Carlisle v. Yoder*, 69 Miss. 384. See *Brougher v. Stone*, 72 Miss. 647. As to the disability of infancy or coverture, see *Patterson v. Durfey*, 68 Miss. 779; *Wolfe v. Brown* (Miss.), 11 South. Rep. 879.

² *Cochran v. Richberger*, 70 Miss. 171. 843.

³ *McGee v. Holmes*, 63 Miss. 50.

⁴ *Lewis v. Siebles*, 65 Miss. 251.

⁵ *Pearce v. Perkins*, 70 Miss. 276.

⁶ *McLemore v. Scales*, 68 Miss. 47.

⁷ *Foote v. Dismukes*, 71 Miss. 10.

⁸ *Spurlock v. Dougherty*, 81 Mo.

⁹ *Allen v. White*, 98 Mo. 55. In

favor of a tax-deed not void on its face, from the time of the recording of such deed;¹ but it does not apply where the deed is void on its face,² nor to a suit by the tax-sale purchaser against the owner.³ And as against remaindermen it does not begin to run until the death of the life-tenant.⁴ Evidence in an action of ejectment by the original owner that the land was sold again for later taxes, and was again bought in by the same purchaser, has no tendency to bring the plaintiff within any of the exceptions of the statute.⁵ As against ejectment under a tax-deed the statute of limitations begins to run from the date of the deed, and not from the first day on which it could have been demanded.⁶

In Nebraska the three years' statute of limitations in favor of the holder of a tax-deed does not run from the date of the recording of the deed, but only from the time the holder takes possession.⁷ The tax-deed must be valid on its face to entitle the occupant thereunder to the benefit of the statute.⁸ In this state one who has been in the actual, open, exclusive, adverse possession of lands, as owner, for ten years, thereby acquires an absolute title in fee, free from the lien created by a tax-deed on the property issued more than ten years before the commencement of the action to foreclose such tax-deed.⁹ And an action to re-

Missouri one is not put into constructive possession of land by taking a sheriff's deed thereof made pursuant to a sale under execution issued on a judgment in an action to enforce the state's lien for delinquent taxes: *Childers v. Schantz*, 120 Mo. 305. See *Callahan v. Davis*, 103 Mo. 444. Filing of tax-deed for record as claim of title by grantee: *Vastine v. Laclede Land, etc. Co.*, 135 Mo. 145.

¹ *Skinner v. Williams*, 85 Mo. 489; *Mason v. Crowder*, 85 Mo. 526.

² *Daniels v. Case*, 45 Fed. Rep. 843; *Mason v. Crowder*, 85 Mo. 526; *Callahan v. Davis*, 90 Mo. 78; *Duffy v. Neilson*, 90 Mo. 93; *Pitkin v. Reibel*, 104 Mo. 505. Though a tax-deed showed that several tracts were illegally sold for a gross sum, the statutory limitation of three years will be a bar to a recovery by the original

owner: *Francis v. Grote*, 14 Mo. App. 324.

³ *Daniels v. Case*, 45 Fed. Rep. 843.

⁴ *Allen v. De Groodt*, 98 Mo. 159.

⁵ *Allen v. White*, 98 Mo. 55.

⁶ *Taft v. McCulloch*, 135 Mo. 588, and cases cited.

⁷ *Baldwin v. Merriam*, 16 Neb. 199.

⁸ *Housel v. Boggs*, 17 Neb. 94; *Bendixon v. Fenton*, 21 Neb. 184. Where a tax-deed is so defective on its face as to create no constructive possession, limitation cannot run in favor of the holder, but he has a lien for all taxes, interest, and costs: *Griffey v. Kennard*, 24 Neb. 174.

⁹ *D'Gette v. Sheldon*, 27 Neb. 829; *Alexander v. Wilcox*, 30 Neb. 793; *Alexander v. Meadville*, 33 Neb. 219; *Black v. Leonard*, 33 Neb. 745; *Alexander v. Pitz*, 34 Neb. 361.

move from the title of a person in possession a cloud which arises from a special assessment levied upon the premises is not barred by lapse of the statutory period of limitation of equitable actions after the date of its creation. Such a cloud constitutes a continuing cause of action, not accruing once for all at the creation of the cloud, but available as a cause of action at all times during its existence.¹

In New Jersey, where the possession of persons who prosecute a suit to set aside as invalid sales of lands for taxes has not been disturbed, lapse of time will not bar the suit.²

In New York non-jurisdictional defects in a tax-title are cured by a statute which provides that when fifteen years have lapsed since sale of unoccupied and unimproved lands belonging to a non-resident, the sale and all proceedings shall be deemed to have been regular.³ A provision in a city charter that any action to test the validity of a tax assessment must be brought in one year from the delivery to the treasurer of the roll containing the assessment does not apply to ejectment brought by the owner to recover lands held under a deed which is void because based on an assessment and sale without jurisdiction.⁴ And an adverse possession originating during the term of tax-leases cannot ripen into a title until the expiration of twenty years from the end of the term of the last of the successive leases.⁵

The statute in force in North Dakota requiring actions to recover possession of lands sold for taxes to be brought within three years after the recording of the tax-deed does not apply when the deed is void on its face,⁶ or where such deed is based upon a void assessment.⁷

The Oregon statute providing that any proceedings for the recovery of lands sold for taxes shall be commenced within three years from the time of recording the deed of sale, and not afterwards, may be invoked in behalf of a tax-title pur-

¹ *Batty v. Hastings* (Neb.), 88 N. W. Rep. 139.

² *Brooks v. Union T'p* (N. J.), 52 Atl. Rep. 238.

³ *Ensign v. Barse*, 107 N. Y. 329.

⁴ *Zink v. McManus*, 121 N. Y. 259.

⁵ *Doherty v. Matsell*, 54 N. Y. Super. Ct. 17.

⁶ *Hegar v. De Groat*, 3 N. D. 354.

⁷ *Roberts v. First Nat. Bank*, 8 N. D. 504; *Sweigle v. Gates*, 9 N. D. 538; *Sheets v. Paine* (N. D.), 86 N. W. Rep. 117; *Eaton v. Bennett* (N. D.), 87 N. W. Rep. 188.

chased in good faith, although such title would be void in the hands of the grantor because of a fraudulent agreement between such grantor and the owner that the sale for taxes be made for the purpose of cutting off an existing mortgage.¹ This statute does not apply to sales made for delinquent street assessments.²

The Pennsylvania statute of 1804 declared that no action for the recovery of lands sold under the act should lie, unless brought within five years after the sale. But this the courts refused to apply literally, because, in the case of a vacant possession, it would cut off the original owner without giving him the opportunity to contest the title; there being no statute permitting ejectment in such cases. They therefore held that the statute began to run, not from the sale, but from the time of possession taken under it.³ Subsequently, when the right to maintain ejectment for an unoccupied tenement had been conferred by the statute, it was held that the statute began to run in favor of the tax-purchaser at the time the sale was perfected by deed, he being constructively in possession of the unoccupied premises from that time.⁴ These decisions have perhaps

¹ Nickum v. Gaston, 24 Or. 380. One in possession of land is not estopped by lapse of time from defeating a tax-title by showing that the taxes for which the land was sold were in fact paid before sale: Nickum v. Gaston, 28 Or. 322.

² Meier v. Kelly, 20 Or. 86.

³ Waln v. Shearman, 8 S. & R. 357; Cranmer v. Hall, 4 W. & S. 36. See, also, Baker v. Kelly, 11 Minn. 480; Boeck v. Merriam, 16 Neb. 199; Dreutzer v. Baker, 60 Wis. 179.

⁴ "It was argued that the limitation in the act of 1804 does not apply to a case where the owner is in possession. That is true, as was determined in Bigler v. Karnes, 4 W. & S. 137, and Shearer v. Woodburn, 10 Pa. St. 511. But that is where the possession is *actual*, and the owner is thus daily and hourly challenging the validity of the tax-title. It is not so, however, in any other case,

and it is settled that in all other cases the limitation runs from the time of the sale, and not from the time when possession is taken by the purchaser. Parish v. Stevens, 3 S. & R. 298, the first case decided under the act of 1804, on this point, was overruled by Waln v. Shearman, 8 S. & R. 357, on the ground that an ejectment would not lie against a vacant possession. But the act of 29th March, 1824, having provided a remedy for the owner in the case of a vacant possession, this court returned to the doctrine of Parish v. Stevens, and it is now held that the limitation runs from the time of the sale, and not of possession. Robb v. Bowen, 9 Pa. St. 71; Sheik v. McElroy, 20 Pa. St. 25; Burd v. Patterson, 22 Pa. St. 219; Stewart v. Trevor, 56 Pa. St. 374. In the last case, Justice Strong, summing up the cases, says: 'Since the act of 29th

given effect to the statute as nearly as was possible, consistent with fundamental rules of right.¹ It is also held in Pennsylvania that the limitation provision, being a statute of repose, should be construed favorably to *bona fide* purchasers.²

In South Carolina the two years' limitation to recover land sold for taxes does not begin to run until the purchaser is put in possession.³

The South Dakota statute limiting suit by the former owner to recover the land to three years from the time the tax-deed is recorded does not run where the deed is void on its face.⁴

In Texas the purchaser at a tax-sale is barred in the same time in which the original owner would be had there been no sale.⁵ One who, entering under a tax-deed void on its face, interrupts another's possession, is confined to his actual occupancy.⁶

In Vermont an act providing that when land has been listed to the grantee or to his grantees in a tax-deed for twenty years or more, and taxes paid thereon, the title of such grantee shall be valid against persons subsequently entering on the land without legal title thereto, does not apply to a person who,

March, 1824, the limitation is perfect at the end of five years from the delivery of the deed to the purchaser, without regard to possession.'" *Agnew, J.*, in *Rogers v. Johnson*, 67 Pa. St. 43, 48. See, also, to the same effect, *Johnston v. Jackson*, 70 Pa. St. 164.

¹ A statute providing that no action for the recovery of land sold for taxes shall lie, "unless brought within five years after the sale thereof for taxes, as aforesaid," will not benefit the holder of the tax-title when suing as plaintiff; and if he sues after five years he must show a valid title: *Bigler v. Karnes*, 4 W. & S. 137; *Shearer v. Woodburn*, 10 Pa. St. 511; *Hole v. Rittenhouse*, 19 Pa. St. 305; *McReynolds v. Longenberger*, 57 Pa. St. 13. It has been decided in Pennsylvania that, as against a mere intruder, the tax-deed, with evidence of title out of commonwealth, is suffi-

cient: *Crum v. Burke*, 25 Pa. St. 377, 381, citing *Foust v. Ross*, 1 W. & S. 501; *Foster v. McDivitt*, 9 Watts 344; *Dikeman v. Parrish*, 6 Pa. St. 210. And see *Shearer v. Woodburn*, 10 Pa. St. 511; *Troutman v. May*, 33 Pa. St. 455; *Wheeler v. Winn*, 53 Pa. St. 122; *Hess v. Herrington*, 73 Pa. St. 438.

² *Mellon's Appeal*, 114 Pa. St. 564.

³ *Gardner v. Reedy* (S. C.), 40 S. E. Rep. 947. See *State v. Morrison*, 44 S. C. 470.

⁴ *Salmer v. Lathrop*, 10 S. D. 216.

⁵ *Jordan v. Higgins*, 63 Tex. 150.

⁶ *Claiborne v. Elkins*, 79 Tex. 380. Where one of several co-tenants of two tracts of land deeds the whole of both tracts to a third person, such conveyance is an assertion of title to the whole, and if the grantee holds exclusive possession and pays the taxes for five years, his title matures by limitation: *Byers v. Carll*, 7 Tex. Civ. App. 423.

after land has been so listed, but before the expiration of the twenty years, enters into the actual adverse possession of it under color of title.¹

The Washington statute providing that no suit to recover lands sold for taxes shall be brought more than three years after recording the tax-deed is not set running in the grantee's favor by a deed which is void upon its face.²

It has been held in West Virginia that the mere fact that a non-resident owner of wild lands, who had reason to suppose the taxes thereon were paid, delayed for a period beyond that of the statute of limitations to assert his claims against one who had held the lands under a tax-deed, does not constitute laches.³

In Wisconsin a statute provides that "any suit or proceeding for the recovery of land sold for taxes, except in cases where the taxes have been paid or the lands redeemed as provided by law, shall be commenced within three years from the time of recording the tax-deed of sale, and not thereafter." That this statute is valid does not seem to have been very seriously questioned.⁴ That it applies against the holder of the tax-title as

¹ Downer v. Tarbell, 61 Vt. 530.

² Coulter v. Stafford, 56 Fed. Rep. 564. See Hurd v. Brisner, 3 Wash. 1.

³ Bartlett v. Ambrose, 78 Fed. Rep. 839. Laches will not bar a landowner from assailing a tax-title where there is no possession under it: State v. Sponaule, 45 W. Va. 415.

⁴ The three-year limitation applies though the land is unoccupied: Hiles v. La Flesh, 59 Wis. 465; Coleman v. Peshtigo Lumber Co., 30 Fed. Rep. 317. After the three years have run the tax-deed cannot be impeached by proof that there was no valid assessment: Oconto County v. Jerrard, 46 Wis. 317, citing Marsh v. Supervisors, 42 Wis. 502; Lawrence v. Kenney, 32 Wis. 281; Wood v. Meyer, 36 Wis. 308. Nor because in the sum for which sale was made a revenue stamp was included: Mill-edge v. Coleman, 47 Wis. 184. Nor,

after the statute has run in favor of a tax-deed, can one who claims title in opposition to it show that it is void for mere irregularities in levying the taxes, making the sales, or executing the deeds: Dupen v. Wetherby, 79 Wis. 203. Although the statute does not, in the case of a tax-deed, preclude inquiry as to whether a tax was levied, or, if levied, whether by competent authority, or whether the tax has been paid, yet, barring such questions, the recording of a tax-deed valid on its face prevents, after the lapse of the statutory period, any inquiry into the validity of the deed, or the regularity of the statutory proceedings: Land & R. Imp. Co. v. Bardon, 45 Fed. Rep. 706; s. c., on error, 157 U. S. 337. The statute does not apply where before the sale the owner offered, and was ready, to pay the tax on his land, but was erroneously informed by the

well as in his favor has been the conclusion of the courts, and it therefore cuts off either the original owner or the tax-purchaser if the adverse claimant has been in the occupation of the land for the period named.¹ It has also been decided that, when the land is unoccupied, the holder of the tax-title has constructive possession, and if the owner of the original title does not bring ejectment (which the owner permits in such case) within the three years he is barred,² but that if the tax-deed is void on its face, the grantee in it has no constructive possession, and in such case the statute does not run in his favor,³

town treasurer that there was none to pay: *Gould v. Sullivan*, 84 Wis. 659. Nor does it apply where the tax-sale was based upon an assessment made by a town having no jurisdiction of the land: *Wadleigh v. Marathon County Bank*, 58 Wis. 546, citing *Smith v. Sherry*, 54 Wis. 114. The statute is confined to tax-deeds, and prescribes no limitation as to tax-certificates: *Hotson v. Wetherby*, 88 Wis. 324. The statute limiting the time for bringing actions to set aside tax-sales applies to sales for the non-payment of a street assessment: *Pratt v. Milwaukee*, 93 Wis. 658.

¹ *Edgarton v. Bird*, 6 Wis. 527; *Sprecher v. Wakeley*, 11 Wis. 432; *Knox v. Cleveland*, 13 Wis. 245; *Jones v. Collins*, 16 Wis. 594; *Parish v. Eager*, 15 Wis. 532; *Whitney v. Marshall*, 17 Wis. 174. These decisions held applicable to the Iowa statute: *Barrett v. Holmes*, 102 U. S. 651; *Brown v. Painter*, 38 Iowa 456; *Laverty v. Sexton*, 41 Iowa 435; *Peck v. Sexton*, 41 Iowa 566; *Wallace v. Sexton*, 44 Iowa 257. As to the limitation of action where grantee in recorded tax-deed, after quitclaiming to original owner who failed to record his deed, conveyed to another without notice: *Warren v. Putnam*, 63 Wis. 410. As to what constitutes adverse possession within the meaning of statutory provisions limiting actions to recover

land sold for taxes, see *Finn v. Wisconsin River Land Co.*, 72 Wis. 546.

² *Geekie v. Carpenter County*, 106 U. S. 329; *Bardon v. Land, etc. Imp. Co.*, 157 U. S. 327; *Coleman v. Peshigo Lumber Co.*, 30 Fed. Rep. 317; *Gunnison v. Hoehne*, 18 Wis. 268; *Lawrence v. Kinney*, 32 Wis. 281; *Oconto County v. Jerrard*, 46 Wis. 317; *St. Croix, etc. Co. v. Ritchie*, 73 Wis. 409; *Dupen v. Wetherby*, 79 Wis. 203; *Hotson v. Wetherby*, 88 Wis. 324. See *Hill v. Kricke*, 11 Wis. 442; *Dean v. Earley*, 15 Wis. 100. In case of unoccupied land the true owner may bring trespass, though the defendant has a tax-title fair on its face: *Wadleigh v. Marathon County Bank*, 58 Wis. 546, citing *Austin v. Hold*, 32 Wis. 478. Although the statute of limitations has run in favor of a tax-deed under which there has been a constructive eviction, a grantor when sued by his grantee for breach of his covenant of seisin may contest the validity of the deed: *McInnis v. Lyman*, 62 Wis. 191.

³ *Lain v. Shepardson*, 18 Wis. 59; *Cutler v. Hurlbut*, 29 Wis. 152. To the same effect are *Taylor v. Miles*, 5 Kan. 498; *Shoat v. Walker*, 6 Kan. 65. See *Leffingwell v. Warren*, 2 Black 599; *Hall v. Dodge*, 18 Kan. 277. The rule was laid down in *Sydnor v. Palmer*, 29 Wis. 226, that under statutes of limitation "evidence of adverse possession is always to be

though it would do so, even under a void deed, if his possession were actual, open, and notorious.¹ On the other hand a similar possession on the part of the original owner would interrupt the running of the statute against him, notwithstanding the tax-deed is recorded.² The limitation of one year prescribed in a statute curing, unless attack was made during that time, defects "going to the validity of the assessment and affecting the groundwork of the tax," does not, it has been decided, cure defects in the notice of the tax-sale, or in the proof of publication thereof.³ Statutes of limitation relating to actions in which the validity or regularity of tax-sales is questioned do not apply where tax-deeds are attacked as fraudulently obtained.⁴ Under a statute providing that where the original owner had for four years prior to the recording of a tax-deed failed to pay all the taxes, and where the grantee in such deed had for three years after such recording paid all the taxes, the title of the original owner should be barred unless he should bring within nine months from the passage of the statute an action to recover possession, cannot be applied except in a case where all the facts necessary to defeat the original owner, and to perfect the tax-title, existed when the act took effect.⁵ In Wisconsin the special statute of limitation in tax-deed cases must be pleaded,⁶ provided there is opportunity for it.⁷ But

strictly construed, and every presumption is to be made in favor of the true owner." This rule is explained in *Wilson v. Henry*, 35 Wis. 241, 245, as applying to the holder of the tax-title when he claims by constructive possession, and the "true owner" is in such case to be regarded as the original owner, notwithstanding any technical defects to be found in his claim of title. See *Dreutzer v. Baker*, 60 Wis. 179.

¹ *Lindsay v. Fay*, 25 Wis. 460. On this point, see also *Cofer v. Brooks*, 20 Ark. 542; *Hoffman v. Harrington*, 28 Mich. 90; *Washburn v. Cutter*, 17 Minn. 361.

² *Lewis v. Disher*, 32 Wis. 504; *Wilson v. Henry*, 35 Wis. 241, 40 Wis. 594; *Coleman v. Eldred*, 44 Wis. 210;

Smith v. Ford, 48 Wis. 115; *Stephenson v. Wilson*, 50 Wis. 95; *Haseltine v. Mosher*, 51 Wis. 443; *Smith v. Sherry*, 54 Wis. 114. This is but just, as until the tax-purchaser takes possession ejectment cannot be brought against him: *Lombard v. Culbertson*, 59 Wis. 433.

³ *Morris v. Carmichael*, 68 Wis. 133.

⁴ As, for example, where an agent has bought in his principal's land when he should have paid the tax: *McMahon v. McGraw*, 26 Wis. 614. See *Fox v. Zimmerman*, 77 Wis. 414. And see, also, *Carithers v. Weaver*, 7 Kan. 110.

⁵ *Webster v. Schwears*, 69 Wis. 89.

⁶ *Morgan v. Bishop*, 56 Wis. 284.

⁷ *Dreutzer v. Baker*, 60 Wis. 179.

the plaintiff may, without pleading them, give in evidence any facts which would defeat the deed.¹ The recording of a tax-deed by one in possession at the time must, for the purposes of the statute of limitations, be deemed a new entry.² Under a statute making the time for the limitation of an action to contest a tax-title run from the filing of an affidavit that the land was unoccupied, such an affidavit made by one having no knowledge of the fact will set the statute in motion even though the land was in truth unoccupied.³

These references will be sufficient to exhibit the general current of decision under these short statutes of limitation.

Constructive possession. There is serious objection in point of policy to making the tax-deed give constructive possession of the land, with the consequences that have been made to follow, whether there are, or are not, any impediments in point of law. The principal hardships perhaps under any system of tax-sales spring from the fact that, in a considerable portion of the cases in which valuable lands are lost to the owners from delinquency, it is not so much in consequence of culpable neglect of the owners themselves as through the negligence of agents, or through circumstances which have cast the ownership upon children or other persons unaccustomed to business, who are found to be in default before they have fully become possessed of a knowledge of either their rights or their duties. In all these cases the tax-purchaser knows that he has bought a title which, if legal, is to dispossess some title previously valid; while the adverse claimant frequently does not know or suspect that he or his land has been proceeded against for delinquency, and he may for a series of years thereafter continue to pay taxes without any suspicion that he is paying upon the land of another. No man thinks of making periodical visits to the records in order to see that his land is clear of liens, when he is not conscious of any default; and to allow the tax-purchaser to lie by under such circumstances, without asserting a claim by entry or notice, until, by the lapse of a few years, his deed

¹ *Morgan v. Bishop*, 56 Wis. 284, As to the requisites of such an affidavit, see *Dreutzer v. Smith*, 56 Wis. 292; *Howe v. Genin*, 57 Wis. 268.

² *Link v. Doerfer*, 42 Wis. 391.

³ *McDonald v. Daniels*, 58 Wis. 426.

shall ripen into an indisputable title, is to encourage him to commit what, in morals at least, in many cases becomes fraud upon the original owner. And the wrong is still more gross and palpable if, in point of fact, the original owner was not at all in default, and his land has been sold and conveyed in consequence of the carelessness, incompetency, or fraud of public officers. Nevertheless these considerations appeal to the legislature rather than to the courts; for it probably cannot be said that it is beyond the constitutional power of the legislature to give the recorded tax-deed conclusive effect as evidence of title after the lapse of five years' time, in any case where the adverse claimant has no actual possession.¹

Possession of a vacant tenement is and must be purely a matter of fiction. Constructive possession is recognized for some purposes, because, under our peculiar forms of action, it is found necessary in order to the protection of the rights of the owner against trespassers. The fiction is accepted, as all fictions in the law are, for the sake of justice; never to do injustice.² But if one's freehold has been illegally sold under

¹A statute which bars the remedy of the tax-purchaser in five years from the recording of his deed is constitutional, he being at liberty to sue within that time whether the land is occupied or not. The tax-purchaser knows the effect of the deed, and "what he must do to protect his title under it, for all this is plainly written in the law. . . . He took the risk of being able to make his deed effectual under the rules prescribed by the legislature. He gets all he bargained for. So that when the statute of limitations cuts him off, he having, as he imagined, been unable to bring his suit for want of a party in adverse possession, he has been deprived of no right which he ever possessed:" Barrett v. Holmes, 102 U. S. 651.

²Truett v. Justices, 20 Ga. 102; Low v. Little, 17 Johns. 346; Johnson v. Ballou, 28 Mich. 379, 396. In Taylor v. Miles, 5 Kan. 498, in which it is held that the recording of a

void tax-deed cannot be made the date from which the statute of limitations shall run, *Valentine, J.*, says (p. 515): "*First.* A statute of limitations can only be applied where one person has received or suffered some injury from another person, either in contract or tort. It must operate to bar a *cause of action*, for it seems absurd to say that a cause of action can be barred, if no cause of action has ever accrued. *Second.* Every statute of limitation must give the injured party a reasonable time in which to commence his action, or the statute itself is void, tending to disturb vested rights. *Third.* When the statute has run its full time, the effect is to leave the parties in possession of just what they had before, nothing more and nothing less, and neither party has a right of action against the other: the injured party has lost his remedy." Compare *Bowman v. Cockrill*, 6 Kan. 311.

adverse proceedings, there is no justice in resorting to a fiction of law in order to sustain the sale. What equity could exist in such a case, if one has honestly paid all that was demanded of him, or all that he has any reason to believe he owed?¹

In the very worst light in which the equities of the original owner may be viewed, they are at the least equal to those of the tax-purchaser; and to make a fiction the instrument by which he is to be debarred of his rights is a very severe, if not excessive, exercise of authority, where the legislature had already put him quite sufficiently at disadvantage. Rules of evidence are subject to legislative control; and therefore the legislature may make the tax-deed evidence of title. Rules of limitation are also subject to its control, and therefore the statute may quiet an open and public exercise of a right which remains unchallenged; but a purely nominal and fictitious exercise of a right by means of the recording of a paper, or even without that, if the legislature shall think proper to dispense with it, is a very unsubstantial basis for a conclusive muniment of title to land. Constructive possession in any case, it would seem, should be in the party having the legal title; and this would leave questions of title open so long as actual possession was had by no one.²

Claim or color of title. Peculiar questions arise under some statutes regarding the nature of the claim under which posses-

¹ The language here employed is that of *Agnew, J.*, in *Brown v. Hays*, 66 Pa. St. 229, 236. The case was one in which a single warrant of one thousand and twenty-six acres had been assessed as two of seven hundred and twenty-six and three hundred, respectively, and the owner had paid the assessment on the warrant by the number. *Held*, that the assessment of the warrant at seven hundred and twenty-six acres was not, by implication, notice to him that the three hundred acres were assessed separately.

² Possession and cultivation of a few acres cannot be constructive possession of a whole township: *Chandler v. Spear*, 22 Vt. 388. Neither the

fact that one is assessed for the land, or that he has paid taxes for a series of years thereon, is sufficient proof that he is in the adverse possession of it: *McDermott v. Hoffman*, 70 Pa. St. 31, 54; *Chapman v. Templeton*, 53 Mo. 463. And merely cutting timber, without actual possession, cultivation, or inclosure, is not adverse possession, but a mere trespass on the constructive possession of the owner: *Washburn v. Cutter*, 17 Minn. 361; *Safford v. Basto*, 4 Mich. 406; *Rivers v. Thompson*, 46 Ala. 335. An occasional entry on land to cut timber is not "actual continuous possession" under color of title: *Yokum v. Fickey*, 37 W. Va. 762.

sion is held. The Illinois statute of 1839 declared the person in possession of land "under claim and color of title," who should continue in possession for seven years, and pay all taxes, should be held and adjudged the legal owner, "to the extent and according to the purport of his or her paper title." Here was a distinct requirement of a paper title of some kind, and of one also that should give "color" of title. Where the tax-deed is made *prima facie* evidence of title, it is plain that it gives color of title; and the decisions have been that the seven years' possession under the circumstances required by the statute was sufficient with such a conveyance.¹ The same decis-

¹ *Dawley v. Van Court*, 21 Ill. 460; *Fell v. Cessford*, 26 Ill. 522, 525; *Halloway v. Clark*, 27 Ill. 483; *Bride v. Watt*, 23 Ill. 507; *Webster v. Webster*, 55 Ill. 325; *Wettig v. Bowman*, 47 Ill. 17; *Morrison v. Norman*, 47 Ill. 477; *Dickerson v. Breeden*, 30 Ill. 279, 325; *Hardin v. Crate*, 60 Ill. 215; *Chicago v. Middlebrook*, 143 Ill. 265. To constitute color of title it is sufficient that the deed purports to convey title and has been received in good faith. It need not have been founded upon a valid judgment or a proper precept for sale: *Winstanlay v. Meacham*, 58 Ill. 97; *Lewis v. Pleasants*, 143 Ill. 271; *Taylor v. Hamilton*, 173 Ill. 392; *Lewis v. Barnhardt*, 43 Fed. Rep. 854; *Lewis v. Barnhart*, 145 U. S. 46. See *Halloway v. Clark*, 27 Ill. 483, 486; *Dalton v. Lucas*, 63 Ill. 337. A tax-deed subsequently issued will not relate back so as to constitute color of title existing before the actual execution of the deed: *Harrell v. Enterprise Savings Bank*, 183 Ill. 538. And an instrument which merely purports to contain an instrument to convey title at a future time cannot constitute color of title: *Osterman v. Baldwin*, 6 Wall. 116. A tax-deed made on a purchase of land by a partnership at a tax-sale by one of the partners as deputy-collector does not constitute color of title in the firm or either partner: *Burns v.*

Edwards, 163 Ill. 494. A tax-deed void for uncertainty because undertaking to convey one acre out of a tract, without specifying the part of the tract out of which it is to be taken, does not constitute color of title: *Hanna v. Palmer* (Ill.), 61 N. E. Rep. 1051. In *Burton v. Perry*, 146 Ill. 71, a tax-title based upon an affidavit showing that notice of redemption was not properly given was held not sufficient title to set in motion the statute of limitations; while in *Duck Island Club v. Rexstead*, 174 Ill. 435, it was held that the fact that the purchaser at a tax-sale failed to comply with the statutory requirements as to notice governing the execution of tax-deeds does not establish bad faith or fraud so as to render the deed unavailing as color of title. Where the purchaser goes into possession and continues to hold the land and pay taxes for seven years he will be protected in Illinois, although the deed is void on its face; and good faith will be presumed, but the contrary may be shown: *Dalton v. Lucas*, 63 Ill. 337; *Reedy v. Camfield*, 159 Ill. 254. As to payment of taxes in Illinois, under claim and color of title, so as to complete the statutory bar, see *Hurlbut v. Bradford*, 109 Ill. 397; *Holbrook v. Gouverneur*, 114 Ill. 623; *Cooter v. Dearborn*, 115 Ill. 509; *Smith*

ions hold, however, that the deed must be one that is not, by reason of defects or of its recitals, void on its face.¹ On the other hand it is held in many states that an instrument void on its face for certain reasons may nevertheless be good as color of title on which to found a claim of title by adverse possession.² In Iowa the statutes protect the occupant who

v. Prall, 133 Ill. 308; *Grant v. Joliet, I. & E. R. Co.*, 128 Ill. 386; *Robbins v. Moore*, 129 Ill. 30; *Timmons v. Kidwell*, 138 Ill. 13, 149 Ill. 507; *Chicago v. Middlebrooke*, 143 Ill. 265; *Burton v. Perry*, 146 Ill. 71; *St. Louis, I. & E. R. Co. v. Warfel*, 163 Ill. 641; *Donaline v. Illinois Cent. R. Co.*, 165 Ill. 640; *Neiderer v. Bell*, 174 Ill. 325. "What is meant by *color of title*? It may be defined to be a *writing*, upon its face professing to pass title, but which does not do it, either from want of title in the person making it, or from the defective conveyance that is used—a title that is imperfect, but not so obviously that it would be apparent to one not skilled in the law;" per *Lumpkin, J.*, in *Beverly v. Burke*, 9 Ga. 440, 443. Color of title is that which in appearance is title, but which in reality is no title. No exclusive importance is to be attached to the invalidity of a colorable or apparent title, if the entry or claim has been made in good faith: *Wright v. Mattison*, 18 How. 50; *Beaver v. Taylor*, 1 Wall. 637. It is immaterial, in West Virginia, whether the paper title of a plaintiff in ejectment is good or not, when he has proved adverse possession and payment of taxes for ten years, for this gives a perfect title under the state statute of limitations: *Hackett v. Marmet County*, 52 Fed. Rep. 268, 3 C. C. A. 76.

¹See, besides the Illinois cases above referred to, *Keefe v. Bramhall*, 3 Mackey 551; *Cain v. Hunt*, 41 Ind. 466; *Shoat v. Walker*, 6 Kan. 65; *Carithers v. Weaver*, 7 Kan. 110;

Sapp v. Morrill, 8 Kan. 677; *Wofford v. McKinna*, 23 Tex. 36; *Kilpatrick v. Sisneras*, 23 Tex. 114. A tax-deed which does not show that the land it purports to convey was sold for delinquent taxes is void on its face; and where the holder of such a deed has not been in actual possession of the property, the statute of limitations will not run so as to bar the right to bring an action in two years to have the deed declared void: *Hubbard v. Johnson*, 9 Kan. 632.

²*Deputron v. Young*, 134 U. S. 241; *Cawley v. Monson*, 10 Biss. 182; *Bartlett v. Ambrose*, 78 Fed. Rep. 839; *Stovall v. Fowler*, 72 Ala. 77; *Taylor v. Corley*, 113 Ala. 580; *Wilson v. Atkinson*, 77 Cal. 485; *Bennet v. North Colorado Springs Land, etc. Co.*, 23 Colo. 470; *Chicago, R. I. etc. R. Co. v. Alfree*, 64 Iowa 500; *Ricker v. Butler*, 45 Minn. 545; *Hamilton v. Boggess*, 63 Mo. 233; *Wilson v. Purl*, 133 Mo. 367; *Gatling v. Lane*, 17 Neb. 77, 80; *Lantry v. Parker*, 37 Neb. 353; *Stevens v. Johnson*, 55 N. H. 405; *Power v. Kitching (N. D.)*, 86 N. W. Rep. 737; *Smith v. Shattuck*, 12 Or. 362; *Parker v. Vinson*, 11 S. D. 381; *Stokes v. Allen (S. D.)*, 89 N. W. Rep. 1023; *Ward v. Huggins*, 7 Wash. 617; *Bryant v. Groves*, 42 W. Va. 10; *Edgerton's Adm'r v. Bird*, 6 Wis. 527; *Sprecher v. Wakeley*, 11 Wis. 432; *Lindsay v. Fay*, 25 Wis. 460; *Oconto County v. Jerrard*, 46 Wis. 317; *McMillan v. Wehle*, 55 Wis. 685. See *Cutler v. Hurlbut*, 29 Wis. 152; *North v. Hammer*, 34 Wis. 432. It was held in *De Foresta v. Gast*, 20 Colo. 307, that a tax-deed regularly executed

has been in possession under "claim" of title for the requisite period, and this may be with or without a deed or other documentary evidence giving color of right to the claim.¹ And probably in any state a tax-deed based upon an actual sale, and not void upon its face, would be held sufficient color of right for the purposes of the statute.²

gives color of title, though a person of legal learning and experience may, by a critical examination, discover fatal defects in the instrument. That defendant's attention was called to defects in a tax-deed under which he claimed as color of title does not destroy its effect as color of title: *White v. Forris*, 124 Ala. 461. A person claiming under a void tax-deed has no color of title until after the delivery of the deed to the recorder to be recorded: *Nye v. Alfter*, 127 Mo. 529.

¹ *Hamilton v. Wright*, 30 Iowa 480. And see *Taylor v. Buckner*, 2 A. K. Marsh. 18; *McCall v. Neeley*, 3 Watts 69, 72.

² See *Moore v. Brown*, 11 How. 414; *Pillow v. Roberts*, 13 How. 472; *Moore v. Brown*, 4 McLean 211; *Todd v. Kauffman*, 19 D. C. 304; *Dillingham v. Brown*, 38 Ala. 311; *Rives v. Thompson*, 43 Ala. 633, 641; *Ladd v. Dubroca*, 61 Ala. 25; *Stovall v. Fowler*, 72 Ala. 77; *Cofer v. Brooks*, 20 Ark. 542; *Pleasants v. Scott*, 21 Ark. 370, 374; *Stubblefield v. Borders*, 92 Ill. 279; *King v. Harrington*, 18 Mich. 213; *Wheeler v. Merriman*, 30 Minn. 372; *Chapman v. Templeton*, 53 Mo. 463; *Smith v. Johnson*, 107 Mo. 494; *Flannagan v. Guinmet*, 10 Grat. 421. Where land was sold for taxes in a certain county, a deed delivered by the proper officer of such county was not absolutely void, but was an assurance or color of title, though at the time of delivery the land had become part of another county: *Hubbard v. Godfrey*, 100 Tenn. 150. A defective tax-deed

may be introduced to show color of title on which to base a claim of adverse possession: *Reusens v. Lawson*, 91 Va. 226; *Lennig's Ex'rs v. White* (Va.), 20 S. E. Rep. 831. Deed not properly witnessed or recorded held admissible as color of title: *Keech v. Enriquez*, 28 Fla. 597. In Alabama a tax-deed not signed or acknowledged as required by law gives the grantee color of title, and will give him possession of the whole tract on his taking general possession of a part: *Reddick v. Long*, 124 Ala. 260. But in that state a tax-deed made by the probate judge to one who was neither the original purchaser at the tax-sale nor the assignee of the certificate of purchase does not constitute color of title for adverse possession: *Childress v. Calloway*, 76 Ala. 128; *Alexander v. Savage*, 90 Ala. 383. An agent who, by his principal's direction, took the title to land in his own name in settlement of a claim due such principal, has not such "color of title" that payment of taxes for five successive years will make him the owner by virtue of the Colorado statute: *Warren v. Adams*, 19 Colo. 515. A tax-deed not authenticated by the seal of the county as required by statute is not color of title: *Sutton v. Stone*, 4 Neb. 319. The same is true of one whose description is void for indefiniteness: *Humphries v. Huffman*, 33 Ohio St. 395. But a tax-deed accompanied by possession may give color of title, although the description of the land is imperfect: *Smith v. Shattuck*, 12 Or. 362. Deed held to be color of

Obligations of contract — Vested rights. The statute of limitations when a tax-sale is made does not make part of the contract of sale, and that statute may be repealed and one extending the time against the purchaser's interest may be enacted without violating the constitution.¹ It is also a principle of law that where the statute of limitations has run in favor of any party this perfects his right and he may make it the ground of affirmative proceedings thereafter. This principle applies in favor of the tax-title, and dispenses with any necessity for proof of the proceedings when the title is brought in question subsequently, and precludes attack upon it.²

title as to all land described therein, so as to make possession — which was accompanied by payment of taxes — adverse as to heirs claiming as cotenants in common: *Van Gunden v. Virginia Coal, etc. Co.*, 52 Fed. Rep. 838, 3 C. C. A. 294, 8 U. S. App. 229. A purchaser of land at a tax-sale in Vermont acquires no title or color of title unless the sale is followed by a deed from the collector: *Davenport v. Newton*, 71 Vt. 11, citing *Langdon v. Templeton*, 66 Vt. 173.

¹ *Keith v. Keith*, 26 Kan. 26. But in the absence of any provision saving rights of action already accrued, or words to give it retrospective effect, a statute passed in 1872 will not bar an action brought in 1875 on a sale made in 1869, although only five years from the date of sale are allowed in which to sue: *Dale v. Frisbie*, 59 Ind. 530.

² *Morton v. Sharkey*, *McCahon* 113; *Martin v. Martin*, 35 Ala. 560; *Couch v. McKee*, 1 Eng. (Ark.) 484, 495; *Bradford v. Shine*, 13 Fla. 393;

Hinchman v. Whetstone, 23 Ill. 185; *Chiles v. Davis*, 58 Ill. 411; *Stipp v. Brown*, 2 Ind. 649; *McKinney v. Springer*, 8 Blackf. 506; *Thompson v. Caldwell*, 3 Litt. 137; *Lewis v. Webb*, 3 Me. 326; *Atkinson v. Dunlap*, 50 Me. 111; *Holden v. James*, 11 Mass. 396; *Wright v. Oakley*, 5 Met. 400; *Davis v. Minor*, 1 How. (Miss.) 183; *Taylor v. Courtney*, 15 Neb. 190; *Woart v. Winnick*, 3 N. H. 473; *Moore v. Luce*, 29 Pa. St. 260; *Girdner v. Stephens*, 1 Heisk. 280; *Briggs v. Hubbard*, 19 Vt. 86; *Wires v. Farr*, 25 Vt. 41; *Sprecher v. Wakeley*, 11 Wis. 432; *Knox v. Cleveland*, 13 Wis. 245, 249; *Pleasants v. Rohrer*, 17 Wis. 557; *Lawrence v. Kenney*, 32 Wis. 281. It was, however, held in *Kipp v. Johnson*, 31 Minn. 360, that upon the repeal of a statute requiring that proceedings to test the validity of a tax-title be brought within three years, actions may be brought in cases in which the time had fully run before the repeal.

CHAPTER XVIII.

TAXATION OF BUSINESS AND PRIVILEGES.

The general right. It has been seen that the sovereignty may, in the discretion of its legislature, levy a tax on every species of property within its jurisdiction, or, on the other hand, that it may select any particular species of property, and tax that only, if in the opinion of the legislature that course will be wiser. And what is true of property is true of privileges and occupations also; the state may tax all, or it may select for taxation certain classes and leave the others untaxed. Considerations of general policy determine what the selection shall be in such cases, and there is no restriction on the power of choice unless one is imposed by constitution.¹ In another chapter it has been shown that constitutional provisions requiring the taxation of property by value have no application to the taxation of other subjects, and do not, therefore, by implication, forbid the question now under consideration.²

Federal taxation. The government of the United States has general power to levy taxes on all the subjects of taxation within the several states and territories and in the District of Columbia.³ The exceptions to this general power have been

¹Phoenix Carpet Co. v. State, 114 Ala. 143; Union Trust Co. v. Wayne Circuit Judge, 125 Mich. 487; State v. Smithson, 106 Mo. 149; St. Louis v. McCann, 157 Mo. 301; Gelsthorpe v. Furnell, 20 Mont. 299; Butler's Appeal, 73 Pa. St. 448, 451, citing Durach's Appeal, 62 Pa. St. 491. See Rowe v. McWilliams, 52 Ga. 251; Decker v. McGowan, 59 Ga. 805. It is a well-known attribute of sovereign power to tax any occupation for the purpose of raising revenue, and such tax may be laid and collected in the form of a license fee: Price v. People, 193 Ill. 114.

²See ch. VI; Rohr v. Gray, 80 Md. 274.

³See *ante*, pp. 178-180; Loughborough v. Blake, 5 Wheat. 317. The tax authorized by the act of congress of June 13, 1898, upon each sale of products by an exchange or board of trade is not a tax upon the business itself which is so transacted, but is a duty upon the facilities made use of and actually employed in the transaction of business, and apart from the business itself: Nicol v. Ames, 173 U. S. 509.

mentioned in preceding pages¹ and need not be repeated. But although it has this general power, its exercise is commonly limited to comparatively few subjects, and the government revenues are collected in the main from taxes levied in various forms upon business.

Customs duties are levied by the United States exclusively, but internal taxes on business may be laid by the states as well as by the general government; and what is said in this chapter is applicable to taxation by both, where the contrary is not indicated.

The methods in which business shall be taxed are also in the legislative discretion.² The taxes which are most customary are: 1. On the privilege of carrying on the business. 2. On the amount of business done. 3. On the gross profits of the business. 4. On the net profits or profits divided. But the tax may be measured by other standards prescribed for the purpose as well as by these.³

It has been seen that it is no conclusive objection to any such tax that it duplicates the burden to the person who pays it. To tax a merchant upon his stock as property, and also upon his gross sales, may seem burdensome, but it is not unconstitutional when the people have not seen fit expressly to forbid it.⁴ The two taxes are not identical, and though it may operate unjustly in individual cases to impose both, such will not be a necessary result; and it is always to be presumed that all the burdens of taxation have been distributed by the

¹ See ch. III.

² *McHenry v. Alford*, 168 U. S. 651.

³ A requirement that foreign insurance companies pay into the state treasury a certain percentage of their gross receipts as a condition of doing business in the state partakes of the nature of the first two of these methods, and the tax need not be uniform upon all engaged in the business of insurance: *Scottish Union, etc. Ins. Co. v. Herriott*, 109 Iowa 606. A statute levying a tax on the gross receipts of specified enterprises after deducting the expenses of carrying on the business is a provision for an occupation

tax: *Capital City Water Co. v. Board of Revenue*, 117 Ala. 303. How gross profits of agent's or intermediary's business of borrowing and loaning money are ascertained, see *New Orleans v. Comptoir National*, 104 La. 214.

⁴ See *Washington v. State*, 13 Ark. 752; *Straub v. Gordon*, 27 Ark. 625; *Carson v. Forsyth*, 94 Ga. 617; *German Nat. Ins. Co. v. Louisville (Ky.)*, 54 S. W. Rep. 732; *Aurora v. McGannon*, 138 Mo. 38; *Springfield v. Smith*, 138 Mo. 645; *State v. Foster*, 22 R. I. 163; *Mabry v. Tarver*, 1 Humph. 94; *Ogden City v. Crossman*, 17 Utah 66; *Lewellen v. Lockharts*, 21 Grat. 570.

legislature with due regard to equality in the final results of collection. A tax, therefore, which at first blush appears to be invidious and partial may nevertheless in its ultimate results prove to be as just and equal as any.

Taxes on privileges. The following of one of the ordinary employments of life is not to be regarded as a privilege unless expressly made so by statute; and authority conferred by a municipal charter to tax privileges could not, therefore, without further designation, be held to embrace such employments.¹ And when employments are expressly permitted to be taxed as privileges, the burden is usually restricted to those which in some particular are exceptional, either because they are thought to be specially profitable, or because they require special regulations, or because the privilege is in the nature of a franchise, or because they supply a general demand, so that the burden imposed will be generally distributed. But no employment is absolutely exempt from the liability to be taxed.² The neces-

¹ See *Columbia v. Guest*, 3 Head 413; *Charleston v. Oliver*, 16 S. C. 47. It was held in *Chicago v. Collins*, 175 Ill. 445, that as the use of the public streets is a right and not a privilege or an occupation, a city has not power to pass an ordinance imposing a tax by way of license upon bicycles and other wheeled vehicles. In *Robertson v. Commonwealth*, 101 Ky. 285, it was decided that a statute requiring the payment of a license tax by any person residing upon a boat on a navigable river "for any purpose whatever" is not unconstitutional as depriving the citizen of the privilege of living where he chooses; for the right to occupy the highway rests on the will of the state.

² The legislature has general power to tax occupancies, and to authorize municipalities to do so: *Davis v. Petrinovich*, 112 Ala. 654; *Kentz v. Mobile*, 120 Ala. 623; *San José v. Railway Co.*, 53 Cal. 475; *Atlanta Nat. B. & L. Assoc. v. Stewart*, 109 Ga. 80; *Price v. People*, 193 Ill. 114; *St. Louis*

v. McCann, 157 Mo. 301; *State v. Bennett*, 19 Neb. 191; *Columbus v. Hartford Ins. Co.*, 25 Neb. 83; *Magneau v. Fremont*, 30 Neb. 843; *York v. Chicago, B. & Q. R. Co.*, 56 Neb. 572; *Ex parte Siebenhauer*, 14 Nev. 365; *Winston v. Taylor*, 99 N. C. 210; *State v. Foster*, 22 R. I. 163; *Albrecht v. State*, 8 Tex. App. 216. The provision of the Illinois constitution authorizing the taxation of certain occupations specifically enumerated does not limit the taxing-power to those particular occupations, that implication being expressly forbidden by the constitution itself: *Price v. People*, *supra*. A constitutional provision that license taxes may be imposed only on occupations which cannot be reached by the *ad valorem* system is not contravened by a statute imposing a license-tax on residents of the state for the privilege of fishing in the waters of the state: *Morgan v. Commonwealth*, 98 Va. 812. Or by an ordinance imposing a license-tax upon publishers of newspapers: *Norfolk v. Norfolk Land-*

sities of the government may require that the lowest employment as well as the most lucrative shall contribute to its support, and if any is exempted motives of policy will govern the discrimination.¹

When the tax takes the form of a tax on the privilege of following an employment, convenience in collection will commonly dictate the requirement of a license, and the person taxed will be compelled to pay the tax as a condition to the right to carry on the business at all.² In such a case the business carried on without a license will be illegal, and no recovery can be had upon contracts made in the course of it.³ This distinguishes

mark Pub. Co., 95 Va. 564. Under the Arkansas constitution no tax can be imposed upon callings and pursuits for the purpose of raising a state revenue: *Hynes v. Briggs*, 41 Fed. Rep. 468.

¹ Where occupations shall be taxed, and how they shall be classified, are questions to be determined by the general assembly: *Atlanta Nat. B. & L. Assoc. v. Stewart*, 109 Ga. 80. A constitutional provision prohibiting the legislature from levying taxes upon the inhabitants of municipalities for municipal purposes applies only to taxation proper, and not to license-taxes: *State v. Camp Sing*, 18 Mont. 128. The provision of the California constitution that the legislature shall not have power to impose taxes, but may by general laws vest in the corporate municipal authorities the power to assess and collect taxes for such purposes, does not preclude a statute forbidding boards of supervisors from imposing a license-tax as a revenue measure: *Ex parte Pfirman* (Cal.), 66 Pac. Rep. 204.

² License Tax Cases, 5 Wall. 462; *State v. Irvin*, 126 N. C. 989. License taxes are in effect assessed by the statute, and become due and collectible as soon as the person assumes to exercise as a business the profession, trade, or occupation upon which the tax is imposed: *Worth v. Wright*,

122 N. C. 335. Where a privilege tax is payable before the business is begun, no formal assessment is required: *Texas Banking, etc. Co. v. State*, 42 Tex. 636; *Blessing v. Galveston*, 42 Tex. 641. It was held in *State v. Aitkin* (Neb.), 85 N. W. Rep. 395, citing *State v. Bennett*, 19 Neb. 191, that the payment of an occupation-tax cannot be made a condition precedent to obtaining a license to conduct the business sought to be taxed; and the same case, citing *State v. Wilcox*, 17 Neb. 219, holds that where a tax is collected as a condition of obtaining a license, it is license money and not a tax within the meaning of the Nebraska constitution.

³ See *Page v. State*, 11 Ala. 849; *Alexander v. O'Donnell*, 12 Kan. 608; *Anding v. Levy*, 57 Miss. 51; *Decell v. Lewenthal*, 57 Miss. 331; *Sneed v. Assurance Co.*, 72 Miss. 51; *Crum v. Shoe Co.*, 72 Miss. 458; *Sun Mut. Ins. Co. v. Searles*, 73 Miss. 62; *American F. Ins. Co. v. First Nat. Bank*, 73 Miss. 469; *Cunningham, etc. Co. v. Atlanta Nat. etc. Assoc.*, 73 Miss. 516; *Doran v. Phillips*, 47 Mich. 228; *Bancroft v. Davis*, 21 Vt. 456. An unlicensed attorney cannot recover for professional services in a court of record, even though such services were rendered under a contract therefor: *Sellers v. Phillips*, 37 Ill.

such a case from one of neglect to pay taxes in general; for except where payment is thus made a condition to the right to transact business, a default therein cannot affect the validity of business transactions.¹ But license and tax do not necessarily go together; a license may be required when no tax is imposed, and an unconditional license does not exempt the licensee from being taxed upon the privilege it gives him. In this particular all valuable privileges stand upon the same footing; they are all liable to taxation at the will of the state, unless the state has bargained to exempt them. As is said in one case, "there is a clear distinction recognized between a license granted or required as a condition precedent, before a certain thing can be done, and a tax assessed on the business which that license may authorize one to engage in. A license is a right granted by some competent authority to do an act which, without such authority, would be illegal. A tax is a rate or sum of money assessed upon the person, property, etc., of the citizen."² The privilege obtained by the license may therefore be taxed in consideration of the property value it

App. 74. An entire, joint, and several contract with a firm of lawyers one of whom has not paid his privilege-tax is void: *McIver v. Clarke*, 69 Miss. 408. A statutory provision that when any person required to pay a privilege-tax has failed to do so, he may pay the amount unpaid for the three years next preceding the act, and shall then be relieved from the penalties for such non-payment on contracts made by him, does not apply to persons in default for more than three years: *McIver v. Clarke*, 71 Miss. 444. Under a statute avoiding all contracts relating to the business of one who has not paid his tax, a trust deed from the vendee of the delinquent to a third person to secure purchase price is valid as between the trustee and the purchaser's creditor: *Crum v. Carrington*, 72 Miss. 458. It is held in Nevada that unless the statute expressly vitiates contracts of sale made by persons failing to pay a

license-tax, such person can recover for goods sold without license: *Mandlebaum v. Gregovitch*, 17 Nev. 87.

¹ *Larned v. Andrews*, 106 Miss. 435, citing *Smith v. Mawhood*, 14 M. & W. 452.

² *Tripppe, J.*, in *Home Ins. Co. v. Augusta*, 50 Ga. 537. And see *Anniston v. Southern R. Co.*, 112 Ala. 557; *Savannah v. Charlton*, 36 Ga. 460; *Burch v. Savannah*, 42 Ga. 596; *Reed v. Beall*, 42 Miss. 472; *Drexel v. Commonwealth*, 46 Pa. St. 31; *Robinson v. Mayor*, 1 Humph. 156; *Ould v. Richmond*, 23 Grat. 464. A license is a tax, but it is a tax on callings and occupations, and not on property. License taxation is governed by rules entirely different from those which control property taxation: *State v. Citizens' Bank*, 52 La. An. 1086. A license is not a tax on property, and, therefore, is not affected by statutory provisions for ascertaining the value for purposes of taxation: *Florida Cent. & P. R. Co. v.*

possesses,¹ and this not only by the state directly, but by the county and town also, if proper authority has been conferred upon them for the purpose;² but where one is licensed by the state to carry on any particular business he cannot, without legislation expressly permitting it, be compelled by a county, city, or town to take out a further license as a condition of doing business in such municipality.³

Columbia, 54 S. C. 266. As to the nature of licenses as taxes, see *Lucas v. Lottery Com'rs*, 11 Gill & J. 190.

¹ See authorities cited in last note. Also *Coulson v. Harris*, 43 Miss. 728, in which a license for which a large sum was paid was held taxable as property. Also *Drysdale v. Pradat*, 45 Miss. 445.

² A town can impose no taxes except as authorized by its charter: *Winston v. Taylor*, 99 N. C. 210; and see *ante*, pp. 465-467, 588.

³ *Phoenix Carpet Co. v. State*, 118 Ala. 143; *Floyd v. Eatonton*, 14 Ga. 354; *Cuthbert v. Conly*, 32 Ga. 211; *Savannah v. Charlton*, 36 Ga. 460; *Burch v. Savannah*, 42 Ga. 596; *Ordinary v. Retailers of Liquors*, 42 Ga. 325; *Home Ins. Co. v. Augusta*, 50 Ga. 530; *Augusta v. Central R.*, 78 Ga. 119; *Hannibal v. Guyott*, 18 Mo. 515; *Dunham v. Rochester*, 5 Cow. 462; *Robinson v. Franklin*, 1 Humph. 156; *Napier v. Hodges*, 31 Tex. 287; *Ould v. Richmond*, 23 Grat. 464. So a town cannot defeat a county license by requiring a town license in addition: *Dunham v. Rochester*, *supra*; *Rome v. Augusta*, 5 Ga. 447. And where the general law provided that every drummer who sold goods must obtain a state license, and that no county should tax him on his sales, it was held that this excluded a further license by the town: *Latta v. Williams*, 87 N. C. 126. A general statute providing for licensing peddlers, and that, on payment of the fee, one may peddle in the territory for which the

license is obtained, suspends the power conferred on cities by an earlier statute to make ordinances relative to licensing peddlers not repugnant to the laws of the state: *State v. Angelo* (N. H.), 51 Atl. Rep. 905. A statute providing that express companies shall pay a privilege-tax to the state, and that no company which has paid such a tax shall be liable to pay any other tax in the state, precludes a city from levying a license tax on an express company: *Douglass v. Anniston*, 104 Ala. 291. Where the general statute exempted foreign express companies from local taxation, they paying a privilege-tax to the state, a city charter authorizing a license-tax upon "each express company" did not authorize a license-tax upon foreign express companies: *Adams Express Co. v. Lexington*, 83 Ky. 657. A provision in a city charter that the city's taxes should "be apportioned in the same manner as the state tax" would preclude its discriminating against an occupation in a degree beyond that made against that occupation by the state: *Marshall v. Snediker*, 25 Tex. 460. But most of the cases cited above recognize the right of the state to give to the municipalities the authority to tax occupations licensed by the state. See, also, *Wiggins v. Chicago*, 68 Ill. 372; *Ex parte Siebenhauer*, 14 Nev. 365. And where the state law permits it, or where at the time of granting the state or county license a valid city ordinance required a city license, it may be ex-

It is generally held that occupation taxes must be uniform upon the same class of subjects.¹ It is also held that license laws cannot be extended by construction, that omissions cannot be supplied by the courts, and that no license-tax can be exacted which is not imposed by the words of the statute or ordinance.²

acted. See *Lutz v. Crawfordsville*, 109 Ind. 466; *Independence v. Noland*, 21 Mo. 394; *Napier v. Hodges*, 31 Tex. 287. The fact that a person has a peddler's license from the state does not authorize him to sell in the streets in violation of a city ordinance: *Commonwealth v. Ellis*, 158 Mass. 555. It is held that a code provision giving to certain municipalities power to levy an occupation tax, "the same not to exceed fifty per centum of the state license-tax upon the same callings," limits the power of the municipalities to levy upon such occupations only as the state has levied upon: *Greenwood v. Delta Bank*, 75 Miss. 162. To the same effect, *Hoefling v. San Antonio*, 85 Tex. 228. And a city was held not to have power to levy a tax for the purpose of conducting a meat market in excess of fifty per cent. of the state tax on the same occupation: *Biloxi v. Borries*, 78 Miss. 657. Where power is given to a city to levy taxes on "all property and privileges taxable by law for state purposes," and to tax and regulate auctioneers and other named avocations, "and all other privileges taxable by the state," the word "privileges" means, not technical privileges, but occupations like those designated; and a market, being a franchise or technical privilege, is not taxable by the city for revenue purposes: *Jacksonville v. Ledwith*, 26 Fla. 163. In *Heise v. Columbia*, 6 Rich. 404, it was decided that a license granted by the state could not be forfeited by a municipal cor-

poration for breach of condition, any more than could any other thing of value. Where a state occupation tax is required to be paid before a town license issues, although the statute does not direct to whom the payment shall be made, by implication it is to be made to the body granting the license: *Williams v. Commonwealth*, 13 Bush 304. It was held in *Holt v. Birmingham*, 111 Ala. 369, and in *Anniston v. Southern R. Co.*, 112 Ala. 557, that a city authorized by charter to license, tax, and regulate certain specified trades and occupations, and "all other privileges, trades, and occupations of all kinds and classes, whether of like kind to those mentioned or not," has authority to enact a license-tax upon a business even though no similar tax is exacted upon such business by the state. That the special powers conferred upon towns in Illinois to charge license fees are valid, though the like licenses are not allowed by the general laws of the state, see *Woodward v. Turnbull*, 3 Scam. 1; *Ottawa v. La Salle*, 12 Ill. 339; *Byers v. Olney*, 16 Ill. 35.

¹ *Atlanta Nat. B. & L. Assoc. v. Stewart*, 109 Ga. 80; *Caldwell v. Lincoln*, 19 Neb. 569. A license-tax applicable to several occupations, and graded according to the value of the stock employed in the business, is not discriminating because so graded and not the same on all persons engaged in like business: *Saks v. Birmingham*, 120 Ala. 190.

² *State v. Bank of Mansfield*, 48 La. 1029.

Construction of municipal powers. The general rule that the powers of a municipal corporation are to be construed with strictness is peculiarly applicable to the case of taxes on occupations,¹ and the authorities concur in holding that if it is not manifest that there has been a purpose by the legislature to give authority for collecting a revenue by taxes on specified occupations, any exaction for that purpose will be illegal.² If a minimum tax is prescribed by statute, one measured by the business,

¹ *New Iberia Trustees v. Miguez*, 32 La. An. 923; *Latta v. Williams*, 87 N. C. 126. On the principle of a strict construction of powers, it was held in *Butler's Appeal*, 73 Pa. St. 448, that the authority to impose a license fee did not carry with it authority to punish by fine and imprisonment the failure to pay the fee. A charter vesting a city with "full power and authority to make such assessments on the inhabitants, or those who hold taxable property within the same, for the safety, convenience, benefit, and advantage of the said city as shall appear to them expedient," does not give power to impose license taxes on business: *Charleston v. Oliver*, 16 S. C. 47. A statute which authorizes the licensing by certain cities of certain enumerated employments, and all other occupations or professions, does not authorize a city to license makers of abstracts of titles: *St. Joseph v. Porter*, 29 Mo. App. 605. Authority given by the charter of a city to raise money for its purposes by taxes and assessments in such manner as the common council shall deem expedient, in accordance with the laws of the state and of the United States, will authorize license fees: *Ould v. Richmond*, 23 Grat. 464; *Western Union Tel. Co. v. Richmond*, 26 Grat. 1. Under a statute authorizing cities of the second class to levy occupation taxes, such a tax may be laid for revenue though the statute does not expressly so provide: *Wilson v. Lex-*

ington (Ky.), 50 S. W. Rep. 834. Under a charter giving the same general power of taxation as is enjoyed by the state, a town may impose a privilege-tax on tobacco-growers: *State v. Irvin*, 126 N. C. 989. Where a city charter authorized the licensing of certain enumerated occupations, and of "all occupations, professions, and trades not heretofore enumerated, of whatever name or character," it was held to authorize the exaction of license taxes from sewing-machine agents, although sewing-machine agents were not *ejusdem generis* with any occupation specifically mentioned: *St. Louis v. Bowler*, 94 Mo. 630.

² See *Kipp v. Paterson*, 26 N. J. L. 298, in which the requirement of a fee of five cents from every person selling hay or other produce within the city was held unauthorized, the power to tax in that manner not having been conferred, and the requirement not appearing to be made as a police regulation. The power of a city to license any occupation must be found in its charter, and must either be granted expressly or be a necessary incident to the carrying out of some power granted: *Wilkie v. Chicago*, 188 Ill. 444. For the general principle, see *Goetler v. State*, 45 Ark. 454; *Dubuque v. Life Ins. Co.*, 29 Iowa 9; *St. Louis v. Laughlin*, 49 Mo. 559; *Robinson v. Franklin*, 1 Humph. 156. It was held in *Rutledge v. Brown*, 14 Lea 124, that a municipal corporation can

and which may exceed the sum named, is unauthorized and void;¹ but where a discretionary power is conferred, its exercise will not be interfered with, unless it clearly appears to have been abused;² and if a city has power to require a license, it may, generally speaking, fix within reasonable limits the amount of the fee or tax.³

Customary business taxes. If taxes were levied on any well matured or intelligible system, it might be practicable to

impose a reasonable license fee where there is no legislation to the contrary.

¹ *Kniper v. Louisville*, 7 Bush 599.

² *Burlington v. Putnam Ins. Co.*, 31 Iowa 102; *Kniper v. Louisville*, 7 Bush 599, citing *Mason v. Lancaster*, 4 Bush 406. It was decided in the case first named that the city might graduate the rate of licenses when not restricted in that regard. And see *East St. Louis v. Wehrung*, 46 Ill. 392. Under a charter declaring that licenses shall be discriminating and proportionate to the amount of business, the council may provide that fees paid by laundrymen for their licenses shall be in proportion to the number of persons employed by them: *Ex parte Li Pratli*, 68 Cal. 635. Where a city has full power to tax, it may increase the rate on a particular class of dealers after the tax first levied has been paid, but before the time for paying it has expired: *Savannah v. Crawford*, 75 Ga. 35.

³ *Portland v. Schmidt*, 13 Or. 17. An occupation tax must be reasonable, and not so high as virtually to prevent carrying on business: *Caldwell v. Lincoln*, 19 Neb. 569. Under a charter giving "authority to levy and collect a license tax . . . upon all persons exercising any profession, trade, or calling within said city," it was held that the power is not given to impose a prohibitory tax upon a useful and legitimate business: *Morton v. Macon*, 111 Ga.

162. In Utah it has been decided that the constitutional right of a city to exact a license is not limited to the mere expense of the regulation of the business, but that the city may impose a reasonable license-tax for the purposes of revenue: *Ogden City v. Crossman*, 17 Utah 66. The reasonableness of an ordinance imposing license fees on a particular occupation is for the court: *Burlington v. Unterkircher*, 99 Iowa 401. It was held in *Hall v. Commonwealth*, 101 Ky. 382, that where the amount of a license-tax on business is left to the discretion of the council, the power to act being conferred by the legislature, a city ordinance imposing such a tax cannot be declared invalid because the tax is unreasonable. In *Price v. People*, 193 Ill. 114, it was said that the amount specified by the general assembly for a license of a particular occupation is conclusive, in the absence of a manifest attempt to raise revenue under the guise of the police power, or to prohibit a lawful calling by oppressive license fees. "The reasonableness or unreasonableness of a license-tax cannot be determined by the extent of the business of a single individual. There may be competition or negligence on his part, or other considerations affecting the extent of the business:" *Nashville, C. & St. L. R. Co. v. Attalia*, 118 Ala. 368; *Same v. Alabama City (Ala.)*, 32 South. Rep. 731.

classify those which are levied upon business, with reference to the special reasons which have induced the selection of particular branches of business for taxation, and the exemption of others. But this is wholly impracticable. Many impolitic taxes are laid, and many unjust taxes, without any purpose to do what is not for the public interest, or what is unfair and unequal. A vast number of subjects are sometimes selected for taxation, because it is supposed justice requires it, when, had the same burden been laid upon a few, it would have been quite as just, quite as equally distributed, and the tax collected with greater economy. Classification will therefore not be attempted, but some reference may be made to those occupations which are most often selected for taxation.

It may be remarked in passing that if one person is found carrying on two or more distinct kinds of business, he is taxable in respect to each;¹ but a city cannot divide a single taxable privilege and require a separate license for each of the elements of right that accrue to citizens thereunder.² If a partnership conducts a business the privilege-tax in respect of the business may be levied on the partners severally.³ A tax on a business

¹ *Savannah v. Feeley*, 66 Ga. 31; *Kelly v. Atlanta*, 69 Ga. 583; *Wilder v. Savannah*, 70 Ga. 760; *Hirsh v. Commonwealth*, 21 Grat. 785. The business of selling liquor is not such a customary, necessary, and inseparable element in the business of a wholesale grocer as will prevent the imposition of a separate and distinct license-tax on each: *Mobile v. Richards*, 98 Ala. 594. Whether an occupation is to be deemed single or not — *e. g.*, when one is commission merchant and factor, and is also agent for steamboats and other vessels — may depend on practice and general understanding: *Wilder v. Savannah*, *supra*. The payment of a tax as a banker does not authorize doing business as a pawnbroker without further license: *New Orleans v. Metropolitan, etc. Bank*, 31 La. An. 310. Where the proper authorities accept payment of a merchant's privilege-tax

from a merchant dealing in new and second-hand clothing, such merchant is not liable to pay a privilege-tax imposed on dealers in second-hand clothing: *Shelton v. Silverfield*, 104 Tenn. 184. A pawnbroker paying a privilege-tax as such is not liable to pay a merchant's tax and a tax on dealers in second-hand clothing: *Ibid*. Where ordinances impose a license-tax on the business of dealing in builders' supplies, and also one on every wagon used for delivery of articles sold in any business, a licensee under the former could not justify by showing, when prosecuted under the latter, that he used the wagon for delivery of such articles only as he sold in his business: *Macon Sash, etc. Co. v. Macon*, 96 Ga. 93.

² *Ex parte Sims*, 40 Fla. 432; *Canova v. Williams*, 41 Fla. 509.

³ *Wilder v. Savannah*, 70 Ga. 760. An occupation license for revenue

should be laid where the business is carried on, not where the party has his residence, if such residence is elsewhere.¹ But if only the property employed in the business were taxed, the owners respectively might be assessed for their interests at their places of residence.²

Architects. The occupation of an architect can be made the subject of a privilege-tax.³

Attorneys at law. Lawyers are subject to such license-taxes for practicing their profession as may be imposed by the state and by municipal authorities. The license authorizing them in the first instance to pursue their calling is an evidence of character and capacity, and carries with it no exemption from taxation by license-tax. The profession has no special privilege from that of other occupations.⁴ It is true that the

purposes to a firm protects a partner who continues to prosecute the business at the same place after his co-partner's retirement: *St. Charles v. Hackman*, 133 Mo. 634.

¹ *Bates v. Mobile*, 46 Ala. 158. See *Miner v. Fredonia*, 27 N. Y. 155; *Gardiner, etc. Co. v. Gardiner*, 5 Greenl. 138. A business done wholly within a city is within the city's taxing power: *Ogden City v. Crossman*, 17 Utah 66. Non-residents doing business in a town may be taxed there: *Moore v. Fayetteville*, 79 N. C. 267. Thus, where a town ordinance imposes a tax on every person buying or offering to buy leaf tobacco, a non-resident purchasing leaf tobacco in the town, to be used in a factory in another town, is a buyer and liable for the tax: *Winston v. Taylor*, 99 N. C. 210. The fact that an owner of vehicles used to transport merchandise within a city lives outside does not exempt him from liability for a license imposed on such vehicles: *Kentz v. Mobile*, 120 Ala. 623. Non-resident attorneys having their offices in a city and practicing there may be taxed there:

Petersburg v. Cocke, 94 Va. 244. Authority "to make such assessments on the inhabitants of" a certain city, "or those who hold taxable property within the same, as may seem expedient," will warrant a tax on a foreign insurance company doing business within the city: *Home Ins. Co. v. Augusta*, 50 Ga. 530. See *Commonwealth v. Milton*, 4 B. Monr. 212. Though a company pays license in Richmond as a merchant, and has by law a right to sell by sample in other counties, this does not authorize it to take its wares into other counties for sale without taking out a merchant's license there: *Webber v. Commonwealth*, 33 Grat. 898.

² See *Gardiner, etc. Co. v. Gardiner*, 5 Greenl. 133.

³ *Burke v. Memphis*, 94 Tenn. 692. Under a charter empowering a city to license many specified avocations, "and other business, trades, avocations, or professions whatever," it was held that the general clause embraced architects: *St. Louis v. Herthel*, 88 Mo. 128.

⁴ *State v. Fernandez*, 49 La. An. 764.

right to impose an occupation-tax on practitioners of law has been much contested, as depriving the attorney of a vested right, or as impairing the obligation of a contract, or as being, in effect, a tax on the privilege of seeking justice in the courts; but it has, nevertheless, been sustained with only faint dissent.¹ As well might it be said that a tax on physicians is a tax on the privilege of preserving the health. Such a tax is not a poll-tax, and it may therefore be levied when poll-taxes are forbidden.² Sometimes the tax is graduated by the supposed value of the privilege.³ Where the charter of a city enumerated certain classes that should be compelled to take out a license before exercising their vocation in the city, and then followed with these words, "and all other business, trades, avocations, or professions whatever," it was held that if the profession "of law" was not specifically enumerated in the section the city had no power to levy a license-tax on lawyers; the rule being, where general rules follow particular ones, to construe them as applicable only to persons or things of the same general character or class.⁴ It has been decided that a power to raise by taxation such sums as may be deemed necessary, in such manner as may be deemed expedient, supports a tax upon either resident or non-resident attorneys who have their offices in the city and practice there.⁵ And a city authorized to tax inhabitants who transact business therein will

¹ *Cousins v. State*, 50 Ala. 113; *Goldthwaite v. Montgomery*, 50 Ala. 486; *Young v. Thomas*, 17 Fla. 169; *Lanier v. Macon*, 59 Ga. 187; *Elliott v. Louisville*, 101 Ky. 262; *Stewart v. Potts*, 49 Miss. 749; *Simmons v. State*, 12 Mo. 268; *St. Louis v. Sternberg*, 69 Mo. 289, 4 Mo. App. 453; *Holland v. Isler*, 77 N. C. 1; *Wilmington v. Macks*, 86 N. C. 88; *State v. Hayne*, 4 S. C. 403; *Languille v. State*, 4 Tex. App. 312; *Ex parte Williams*, 31 Tex. Crim. App. 262. It was held in *Ex parte Williams*, *supra*, that an occupation-tax on lawyers does not infringe a constitutional provision that a person accused of crime shall have the right to be heard by himself or counsel, or both; the accused being always within reach of laws

in a position to defend him by reason of their having paid their tax. The same case holds that the tax is not a violation of the constitutional requirement that taxes shall be equal and uniform.

² *Egan v. Charles County Court*, 3 H. & McH. 169.

³ See *Ould v. Richmond*, 23 Grat. 464.

⁴ *St. Louis v. Laughlin*, 49 Mo. 559.

⁵ *Petersburg v. Cocke*, 94 Va. 244. Under a statute empowering cities to levy license-taxes on attorneys residing therein, a city may not levy such a tax on attorneys not residing therein, but having offices and doing business therein: *Garden City v. Abbott*, 34 Kan. 283.

support a tax on the business of lawyers.¹ If the state licenses a practitioner a city cannot make the payment of a city tax a condition to practicing, but it may nevertheless assess a city tax and collect it by suitable methods.²

Auctioneers are usually taxed either a specific sum periodically, or a sum measured by the extent of their sales.³ It has been held that a tax "on the gross amount of auction sales made in and during the tax year" is to be assessed against and paid by the auctioneer, and not by the owner of the property sold.⁴ This is doubtless correct, though in the end such a tax is paid by the employer. Where a city is given power to tax, license, and regulate the business of auctioneers, all means used to carry out the power must be reasonable. "The city may not directly prohibit the business, nor can it adopt such unreasonable regulations as would produce such results, or even be oppressive and highly injurious to the business." But an ordinance imposing a license tax of \$200 a year, requiring the giving of a bond for the proper performance of duty, and empowering the mayor to revoke the license for misconduct, is not unrea-

¹ *Savannah v. Hines*, 53 Ga. 216. See *Ex parte Williams*, 31 Tex. Crim. App. 262.

² *Wright v. Atlanta*, 54 Ga. 645. See *McCaskell v. State*, 53 Ala. 510; *Ex parte Siebenhauer*, 14 Nev. 365; *Ould v. Richmond*, 23 Grat. 464. A tax on the "privilege" of a lawyer may be enforced (under proper legislation) by levy on the body: *Stewart v. Pott*, 49 Miss. 749. See *Jones v. Page*, 44 Ala. 657; *Cousins v. State*, 50 Ala. 113; *McCaskell v. State*, 53 Ala. 510; *Montgomery v. Knox*, 64 Ala. 463. A lawyer may be subjected by statute to criminal prosecution and fine for practicing without paying his occupation-tax and taking out a license: *Ex parte Williams*, 31 Tex. Crim. App. 262. That lawyers who have failed to pay their license fees cannot recover on contracts for their services, see *Sellers v. Phillips*, 37 Ill. App. 74; *McIver v. Clarke*, 69 Miss. 408, 71 Miss. 444.

³ *Moseley v. Tift*, 4 Fla. 402. A tax on auctions of five dollars a day sustained though the party was taxed as a merchant also. The one tax applies to the party who has goods to be sold, the other to the party making the auction sale: *Fretwell v. Troy*, 18 Kan. 271. A city ordinance establishing a license fee for auctioneers selling household goods — at the house where they have been in use — at fifteen dollars a quarter, or fifty dollars a year, and for auctioneers selling stocks of merchandise, dress-goods, jewelry, etc., at twenty-five dollars a day, is not void as a discrimination against part of a class, since the city council has power to classify a single kind of business in accordance with the kinds of property sold, and grade the license-tax accordingly in its discretion: *Stull v. De Mattos* (Wash.), 62 Pac. Rep. 451.

⁴ *State v. Lee*, 38 Ala. 222.

sonable.¹ It has been held that the charge for a municipal license to sell goods at auction will be presumed reasonable in the absence of evidence to the contrary.²

Bankers and brokers. It has been shown in another chapter that there are various methods of taxing the business of banking. When it is carried on under corporate powers the franchise is sometimes subjected to a specific tax; but taxes are also imposed which are measured by the business done, the deposits received, the profits made, etc. Brokers are taxed after similar standards.³

¹ Wiggins v. Chicago, 68 Ill. 372.

² Iowa City v. Newell (Iowa), 87 N. W. Rep. 739.

³ An institution is a bank, within the meaning of the law imposing a license-tax on banks, if it receives deposits, allows interest, and makes loans: New Orleans v. Savings Inst., 32 La. An. 527. As to definition of bankers and brokers under the federal revenue laws, see Northrup v. Shook, 10 Blatch. 243; United States v. Cutting, 3 Wall. 441; United States v. Fisk, 3 Wall. 445. Of cattle brokers, see United States v. Kenton, 2 Bond 97. Of brokers, State v. Field, 49 Mo. 270. Under a power to tax all persons exercising any trade, calling, or business whatever, a city may tax the business of a chartered bank as well as that of a private banker: Macon v. Savings Bank, 60 Ga. 133; Johnston v. Macon, 62 Ga. 645. Bankers whose whole capital is invested in government securities held taxable as such: Chicago v. Lunt, 52 Ill. 414. The payment of a tax as a banker does not authorize doing business as a pawnbroker without further license: New Orleans v. Metropolitan, etc. Bank, 31 La. An. 310. A bank authorized to deal in securities is not liable to a broker's tax for buying and selling stocks and bonds: State v. Nashville Sav. Bank, 16 Lea 111. One who sells only stocks and bonds bought by

himself is not liable for the broker's privilege-tax: State v. Duncan, 16 Lea 75. As to tax on real estate and insurance brokers, see Braun v. Chicago, 110 Ill. 186. An ordinance taxing insurance agents "representing" corporations, etc., in the insurance business, held not a valid exercise of the power to tax "brokers," conferred by the Illinois statute: McKinney v. Alton, 41 Ill. App. 508. A statute requiring purchasers of notes at a greater share than six per cent. to take out a license, make a statement of the amount employed in the business the preceding year, and pay thereon a tax of five cents on each \$100, the penalty for a failure to comply with the act being \$500, sustained: Young v. Governor, 11 Humph. 147. One who buys judgments for less than their face is not a note shaver or dealer in securities, so as to be liable to a tax on those occupations: Mace v. Buchanan (Tenn. Ch. App.), 52 S. W. Rep. 505. A city ordinance requiring the payment of a license-tax for the privilege of buying claims is void to the extent that it requires a person to pay such tax for the privilege of buying claims for himself and not as a broker, though that may be his "business": Bitzer v. Thompson (Ky.), 49 S. W. Rep. 199; Gast v. Buckley (Ky.), 64 S. W. Rep. 632.

Butchers. A privilege tax on butchers, including offices and stores for the sale of meat, is payable by a grocer who sells meat at retail, though only for a small part of the year.¹ A city, under its power to tax all trades and avocations whatever, may tax keepers of meat-shops.²

Clergymen and teachers. Clergymen are sometimes subjected to an occupation-tax,³ and so are college professors and other teachers.⁴

¹ *Eastman v. Jackson*, 10 Lea 162. Under a statute authorizing a city to levy an annual tax on "goods, wares, and merchandise, and upon all such articles of trade and commerce sold in said city," a butcher, who slaughters his own cattle and sells at a stall in the public market which he rents from the city, is liable for this tax: *Pittsburgh v. Kalchthaler*, 114 Pa. St. 547. A butcher who kills his animals and sells the meat is not a dealer who "buys and sells goods," within the statute imposing a privilege-tax upon such a dealer: *State v. Yearby*, 82 N. C. 561. A statute imposing — with an exemption as to farmers who kill their own product and sell it — an annual license-tax upon the business of buying and selling fresh meat from offices, stores, etc., in cities and towns, applies only to those engaged in such business in incorporated towns: *State v. Green*, 126 N. C. 1032. But it subjects to such tax a person, not being a farmer, who buys the cattle, butchers them, and sells the meat at his store in a city or town: *State v. Carter* (N. C.), 40 N. E. Rep. 11. The power to collect a tax on all kinds of business is broad enough to cover retailing meat by a non-resident butcher who delivers meat to his customers from his wagon. He may be taxed on his business, and his wagon may be taxed as a means of carrying on his business: *Davis v. Macon*, 64 Ga. 128. This case also holds that the exemption of agri-

cultural products from taxation for three months after arrival in the city will not preclude taxation of the business of bringing meat within the city for sale within two weeks after killing. A butcher living outside a city, but having his place of sale within it, may be required to take out a license in it for his cart, though he is taxed for it as property in the county: *Frommer v. Richmond*, 31 Grat. 646. Money demanded and received for a license under a city charter authorizing a butcher to vend meat on his premises held to have been demanded and received under the city's authority to levy and collect occupation taxes: *Hoeffling v. San Antonio*, 85 Tex. 228. It is competent to require a license of private market men, even though it is not required of persons keeping stalls in a public market: *New Orleans v. Dubarry*, 33 La. An. 481. The payment to the city by the occupant of a market stall of a certain price per day, and a certain sum on each animal offered for sale, is rent and not an occupation-tax: *Barthel v. New Orleans*, 26 La. An. 340.

² *St. Louis v. Freivogel*, 95 Mo. 533.

³ *Miller v. Kirkpatrick*, 29 Pa. St. 226.

⁴ See *Union County v. James*, 21 Pa. St. 525. That it is admissible to tax the professions generally, see *Cousins v. State*, 50 Ala. 113; *State v. Hayne*, 4 S. C. 403.

Commercial travelers. Where the statute provides that in order to protect a "drummer" from the penalty to which he is liable for selling without a license, he must have the license in his possession while doing business, a license mailed to him but not received affords no protection.¹ But one who, having a regular place of business, makes a single sale of flour sent to him from a distant state and paid for, is not a "drummer."² It has been decided that a commercial drummer who solicits orders for his house, taking samples of its goods, is not a "traveling vendor" within the meaning of a statute requiring such a vendor to pay a license-tax in each parish.³

Commission dealers are commonly taxed a specific sum periodically, or else a sum measured by their sales.⁴ Under an ordinance requiring "commission merchants and produce deal-

¹ *Lewis v. Dugar*, 91 N. C. 16. The issue of a license to a corporation having several agents and employees traveling and selling was held, in *State v. Morrison*, 126 N. C. 1123, to protect only the agent who had possession of such license.

² *State v. Miller*, 93 N. C. 511, 53 Am. Rep. 469.

³ *Pegues v. Ray*, 50 La. An. 574. So a person engaged in exhibiting samples and taking orders for a non-resident principal is not a "traveling salesman" within a statute prohibiting cities from levying license tax on any traveling salesman: *Price Co. v. Atlanta*, 105 Ga. 358. Soliciting and taking orders for shirts without a license is not a violation of a city ordinance which prohibits selling, offering for sale, bartering, or exchanging, any goods, wares, merchandise, or other articles of value without a license: *Elgin v. Picard*, 24 Ill. App. 340. A drummer who sells his principal's goods by sample, merely taking orders for them, does not require a license such as must be taken out by "hawkers, peddlers, and merchants." Nor does the fact that he makes a single

sale make any difference: *Kansas v. Collins*, 34 Kan. 434. It was held in *Pegues v. Ray*, *supra*, that a business house taking out a license in the town in which it is situated may send canvassers with samples to other towns, without being subject to the payment of any license therefor. For taxes on drummers, see, also, *Ex parte Robinson*, 12 Nev. 263; *Latta v. Williams*, 87 N. C. 126. For a case of a tax on those canvassing to buy, or actually buying, means of subsistence, see *Sledd v. Commonwealth*, 19 Grat. 813.

⁴ *Padelford v. Savannah*, 14 Ga. 438. In *Pearce v. Augusta*, 37 Ga. 597, it was decided that a general authority to levy taxes on *taxable property* would support a tax on the amount of gross sales and on the commissions received. In *Lott v. Ross*, 38 Ala. 156, it was held that a tax on "the gross amount of sales of merchandise" is not a property tax, but an occupation or privilege tax, the amount being regulated by the extent to which the privilege has been enjoyed. (Citing *Moseley v. Tift*, 4 Fla. 402; *State v. Stephens*, 4 Tex. 137; *State v. Bock*, 9 Tex. 369;

ers" to obtain a license, a produce dealer must obtain a license though he is not engaged in the business of a commission merchant.¹ A license to do business generally has been held not to authorize doing the business of selling pools on horse races.²

Draymen, hackmen, etc. While these classes of persons are usually required to take out a license for purposes of regulation, they are also sometimes charged a substantial sum for revenue purposes. A few cases are referred to in which the license fee was construed to be a tax.³ It is competent to lay the tax in proportion to the number of vehicles employed by the persons respectively.⁴ But one cannot be taxed in respect

De Witt v. Hays, 2 Cal. 468; Nathan v. Louisiana, 8 How. 80.) Such a tax would therefore not be leviable under a power to levy a tax "not exceeding twenty cents upon each hundred dollars of taxable property" within the county: *Ibid.* As to when an auctioneer must take out license as commission merchant also, see *Fretwell v. Troy*, 18 Kan. 271; *Neal v. Commonwealth*, 21 Grat. 511.

¹ *Kansas City v. Grush*, 151 Mo. 128.

² *Odell v. Atlanta*, 97 Ga. 670.

³ *Bennett v. Birmingham*, 31 Pa. St. 15; *Commonwealth v. Stodder*, 2 Cush. 562. For certain special questions the following cases may be consulted: *Gartside v. East St. Louis*, 43 Ill. 47; *Snyder v. North Lawrence*, 8 Kan. 42; *St. Charles v. Nolle*, 51 Mo. 122; *Cincinnati v. Byrson*, 15 Ohio 625. Under a statute authorizing the licensing of all "owners and drivers" of vehicles for the carriage of passengers, an ordinance authorizing the licensing of all engaged in the business is invalid: *Osborne v. Springlake*, 64 N. J. L. 362. A livery-stable keeper who lets teams temporarily for hauling ice does not violate a city ordinance against carrying goods for hire without a license: *Havana v. Vanlaningham*, 17 Ill. App. 62. Ordinance imposing license fees on per-

sons running conveyances for hire construed, and held reasonable and valid: *Burlington v. Unterkircher*, 99 Iowa 401.

⁴ *Goodwin v. Savannah*, 53 Ga. 410; *Johnston v. Macon*, 63 Ga. 645; *Howland v. Chicago*, 108 Ill. 496. Under a statute taxing drays and wheeled vehicles "run for a profit," a dray run by a merchant from his store to railroad stations for the accommodation of those buying goods of him is taxable, though he makes no charge for the use of it; it is none the less run for profit: *Knoxville v. Sanford*, 13 Lea 545. Wagons used by coal merchants in delivering coal sold by them to their customers are not run for "fee or reward" within the meaning of a city ordinance providing that such wagons shall be licensed: *Henderson v. Marshall* (Ky.), 58 S. W. Rep. 518. Where a charter empowers a city to regulate the keeping and use of vehicles, and to impose license-taxes on them, an ordinance requiring every hack-owner to take out a license at \$8 per annum, and to pay the cost of numbering the hack, not exceeding twenty-five cents, is valid: *Ex parte Gregory*, 20 Tex. App. 210, 54 Am. Rep. 516. Charter held to authorize a license-tax on all vehicles used for business purposes, whether such ve-

of a carriage used only in his own business under an authority in a city charter to tax the vehicles used by common carriers for hire.¹ Nor does a farmer, by hauling two loads of flour into a city for a miller, render himself liable to the city tax imposed on carters and draymen.² And where a livery-stable and the hacks in it are taxed as property and the owner has paid a license-tax as keeper of a livery-stable, he cannot be compelled to pay in addition a license-tax on the several hacks he owns and uses in his business, since the occupation-tax covers the right to use such vehicles.³ The privilege of doing busi-

hicles are used by common carriers in transferring freight or passengers for pay, or are simply used by merchants for the purpose of delivering goods to their customers: *Johnson v. Mayor* (Ga.), 40 S. E. Rep. 322. Charter held to authorize an ordinance imposing a license on "drays, wagons, and vehicles used in the transportation of goods," etc.: *Browne v. Mobile*, 122 Ala. 159. And the requirement of \$7.50 per annum for each vehicle so used is not unreasonable: *Kentz v. Mobile*, 120 Ala. 623; *Browne v. Mobile*, 122 Ala. 159. Such a requirement simply provides a means for ascertaining the tax to be assessed against the owner, and not against the vehicles: *Kentz v. Mobile*, 120 Ala. 623.

¹ *Joyce v. East St. Louis*, 77 Ill. 156; *Farwell v. Chicago*, 71 Ill. 269. See *Johnston v. Macon*, 62 Ga. 645. Authority to impose a vehicle tax which shall apply only to vehicles used in transporting goods and merchandise, and for hire at public stands and by livery-stables, does not allow a bicycle used only by its owner for pleasure to be taxed: *Davis v. Petrinovich*, 112 Ala. 654. A city empowered to license, tax, and regulate "hackney, carriages, omnibuses, and all other vehicles, and all other business trades whatever, and fix rates for carriage of persons, and wagonage, drayage, and cartage of prop-

erty," has not power to impose a license-tax on a private vehicle: *Hannibal v. Price*, 29 Mo. App. 280.

² *Collinsville v. Cole*, 78 Ill. 114.

³ *Williams v. Garigues*, 30 La. An. 1094. But where one has paid a property tax on his vehicle where he lives, he may be required to pay a tax on it as an instrument of business in the city where he conducts such business: *Davis v. Macon*, 64 Ga. 128. See *Johnston v. Macon*, 62 Ga. 645. Under the New Jersey statute respecting licenses in cities, etc., a borough may not require a license-tax from a cartman whose business is established elsewhere, and who drives occasionally his truck for hire into or through the borough: *Cary v. North Plainfield*, 49 N. J. L. 110. A drayman who has taken out a license to let out horses and vehicles except drays cannot be compelled to take out a drayman's license for occasionally hiring out a wagon by the day to haul freight: *Griffin v. Powell*, 64 Ga. 625. If it does not appear that the business of keeping a public stable necessarily includes running omnibuses and hacks to trains, the impositions of a license-tax on keeping a public stable does not prevent the imposing of a separate license-tax upon persons engaged in running omnibuses and hacks to railroad stations: *Savannah v. Feeley*, 66 Ga. 31. Under a power

ness as an express company includes the privilege of operating vehicles essential to the efficient dispatch of such business.¹

Employment agencies. It is a valid exercise of the state's right to tax particular occupations, to require persons, firms, or corporations, in cities of a specified population, to obtain licenses for opening, operating, or maintaining private employment agencies.²

Hotels. License-taxes on hotels may be proportioned to the number of the rooms, irrespective of the question whether the rooms are actually used.³

Insurance companies. Reference has been made in an earlier chapter to the various methods of taxing those who are engaged in the business of insurance.⁴ It has been held that authority to "license, tax, and regulate . . . insurance companies" confers the power to impose a revenue tax both by way

to regulate the proper government of carts, drays, etc., and to require that the owners shall take a license, and to fix fees and charges of all vehicles kept for hire, a city cannot, in addition to a tax on the business, require the owner to pay for a pair of license plates, costing twenty cents, to be tacked to his vehicle, fees from \$5 to \$20. Says the court: "The city may — for purposes of identification and inspection — require that plates be attached to vehicles kept for hire, and prescribe the form of those plates; but it cannot — under the pretense of securing that distinctive mark — impose on an already taxed and legitimate industry an exaction which, by whatever name it may be called, is but a disguise and additional license." *Walker v. New Orleans*, 31 La. An. 828. Sprinkling carts are taxable as "public vehicles." *St. Louis v. Woodruff*, 71 Mo. 92.

¹ *Memphis v. American Express Co.*, 102 Tenn. 336.

² *Price v. People*, 193 Ill. 114. One who comes into the state and em-

ploy on his own behalf laborers to work for him outside of the state is not an "emigrant agent" within the meaning of a statute taxing such agents: *Theus v. State* (Ga.), 39 S. E. Rep. 913. A statute requiring a tax of \$25 to be paid by every person engaged in procuring laborers to accept employment in another state does not conflict with a constitutional provision authorizing a tax on trades, professions, and employments: *State v. Hunt* (S. C.), 40 S. E. Rep. 216. It is not unreasonable as to amount, and requires the tax to be paid for every separate location in which the business is conducted: *Ibid.* And it does not deny the equal protection of the laws or interfere with interstate commerce: *Ibid.* And see *ante*, pp. 78, 149.

³ *St. Louis v. Bircher*, 7 Mo. App. 169. What is a "hurdy-gurdy" house, see *State v. Tilley*, 9 Or. 125. The power to regulate hotels includes the power to license them: *Russellville v. White*, 41 Ark. 485.

⁴ *Ante*, pp. 700-704.

of a license and on the net income of foreign insurance companies.¹

Liquor manufacturers and dealers. This is a class of persons commonly selected for exceptional taxation. Their occupation is sometimes taxed for federal, state, and municipal purposes, though their stocks are taxed as property, and whatever has been imported has paid a heavy duty. The right to levy these several taxes has almost ceased to be disputed.² Regulation is generally had in view in such taxes, and they will be referred to again in the next chapter. Some of the cases which have considered taxes of this nature are referred to in the note.³ In several states it has been decided that the

¹ *St. Joseph v. Ernst*, 95 Mo. 360.

² See *Block v. Jacksonville*, 36 Ill. 301; *Kitson v. Ann Arbor*, 26 Mich. 325; *Youngblood v. Sexton*, 32 Mich. 406; *Durach's Appeal*, 62 Pa. St. 491; *Aulanier v. Governor*, 1 Tex. 653; *Baker v. Panola County*, 30 Tex. 86; *Harris v. State*, 4 Tex. App. 131; *Languille v. State*, 4 Tex. App. 312; *Tonella v. State*, 4 Tex. App. 325; *Carr v. State*, 5 Tex. App. 153; *Harris v. State*, 8 Tex. App. 216. Under the constitution and statutes of Nebraska it was held in *State v. Bennett*, 19 Neb. 191, that an occupation-tax could be imposed on liquor-dealers in addition to the license-tax. A tax upon dealers in liquors, levied under a general law by which the proceeds are devoted to the use of the towns and cities in which the business is carried on, is a local tax, and not a state specific tax, and the law imposing it is not, therefore, in conflict with the provision of the state constitution applying to state purposes the proceeds of state specific taxes: *Youngblood v. Sexton*, 32 Mich. 406.

³ A license fee for the sale of intoxicating liquors is not a tax imposed upon a citizen *nolens volens*: *McGinnis v. Medway*, 176 Mass. 67, 71. The license-tax imposed "for the use of the state" by the Ala-

bama code upon persons engaged in the business of retailing liquors is a tax for revenue, and is recoverable by an action of debt: *State v. Fleming*, 112 Ala. 179. The burden imposed by a statute requiring the inspection of beer, and exacting a fee therefor, held not to lose its character as a tax on the business because of its giving no permit to carry on such business for a fixed time: *State v. Bisman*, 162 Mo. 1. An ordinance requiring payment of a license-tax for engaging in the occupation of a retail liquor-dealer is not void as imposing a tax on sales and not on the business: *Los Angeles County v. Eikenberry*, 131 Cal. 461. Such taxes, when laid by municipalities, are not void because of their discriminating as between different localities therein: *East St. Louis v. Wehrung*, 46 Ill. 392. An ordinance imposing a license of twenty-five dollars per month on liquor-sellers held not in restraint of trade, or unreasonable, or oppressive: *Ex parte Benninger*, 64 Cal. 291. It will not be presumed as matter of law that fifty dollars a month for retail liquor licenses is unreasonable or oppressive: *In re Guerrero*, 69 Cal. 88. A license-tax for selling intoxicating liquors held not for a single act of

furnishing by a social club of liquors to its members is not a sale within the meaning of statutes imposing taxes on persons engaged in the business of selling liquors;¹ but in other states the contrary is held.² A right to sell liquors is not covered by a license to carry on a confectioner's business, even though a custom prevails for a confectioner to sell them to his customers.³ The conductor of a palace car licensed as an hotel car is not

selling, but for selling as a beverage: *San Luis Obispo County v. Greenberg*, 120 Cal. 300. It was once a question whether license to keep a tavern included authority to sell liquors, and the following cases have considered it, or points bearing upon it: *Page v. State*, 11 Ala. 849; *Commissioners, etc. v. Jordan*, 18 Pick. 228; *Hirn v. State*, 1 Ohio St. 15. Compare *State v. Chamblyss*, 1 Cheves 220; *Commissioners of Roads v. Dennis*, 1 Cheves 229. As to tavern licenses, see further, *State v. Prettyman*, 3 Harr. 570; *Bonner v. Welborn*, 7 Ga. 296; *Commonwealth v. Thayer*, 5 Met. 246; *Hannibal v. Guyott*, 18 Mo. 515; *St. Louis v. Siegrist*, 46 Mo. 593; *Point v. Warner*, 3 Hill 150. Wholesale dealers in intoxicating liquors who are not manufacturers are within the terms of a statute taxing "the business of trafficking in intoxicating liquors," and defining "trafficking" as buying and selling, but not as including "the manufacturing . . . and the sale thereof by the manufacturer:" *Senior v. Ratterman*, 44 Ohio St. 661. As to the difference between a manufacturer and a dealer, see *Commonwealth v. Campbell*, 33 Pa. St. 380. As to who are "retail liquor-dealers" within the meaning of the federal statutes, see *United States v. Starnes*, 37 Fed. Rep. 665; *United States v. Allen*, 38 Fed. Rep. 736; *United States v. Calhoun*, 39 Fed. Rep. 604.

¹ *Seim v. State*, 55 Md. 566; *Commonwealth v. Smith*, 102 Mass. 144;

Commonwealth v. Pomfret, 137 Mass. 564; *Commonwealth v. Ewig*, 145 Mass. 119; *State v. St. Louis Club*, 125 Mo. 308; *Burden v. Montana Club*, 10 Mont. 330; *People v. Adelphi Club*, 149 N. Y. 5; *Columbia Bank v. McMaster*, 35 S. C. 1; *Tennessee Club v. Dwyer*, 11 Lea 452; *State v. Austin Club*, 89 Tex. 20; *Piedmont Club v. Commonwealth*, 87 Va. 541. The same ruling was made in *Graff v. Evans*, L. R. 8 Q. B. Div. 373.

² See *Martin v. State*, 59 Ala. 35; *Rickart v. People*, 79 Ill. 85; *Marmont v. State*, 48 Ind. 21; *State v. Mercer*, 32 Iowa 405, 407; *State v. Horacek*, 41 Kan. 81; *Kentucky Club v. Louisville*, 92 Ky. 309; *State v. Easton Social, etc. Club*, 73 Md. 97; *People v. Soule*, 74 Mich. 250; *State v. Essex Club*, 53 N. J. L. 99; *State v. Lockyear*, 95 N. C. 633; *State v. Neis*, 108 N. C. 87.

³ *New Orleans v. Jané*, 34 La. An. 667. A retail grocer, however, is not, in Louisiana, liable to a license-tax as a liquor-dealer, unless he sells by the glass, to be drunk on the premises: *State v. Sies*, 30 La. An. 918. The Louisiana statute requiring a license of fifty dollars to retail liquors in less quantities than one pint does not import that a dealer, combining with such selling an ordinary business, shall also pay the ordinary license of five dollars: *Jefferson Police Jury v. Marrero*, 38 La. An. 896. One who buys grapes and manufactures them into wines, and sells the same at his place of business in either bar-room or grocery, is liable

protected by his license in selling intoxicating drinks therein without paying the occupation-tax as a dealer in liquors.¹ But a boat plying upon navigable waters between different states cannot be considered as conducting or doing business at each and every point where she touches, so as to become subject to taxation at each of such points in respect to sales of liquor at its bar.² A license-tax may be imposed on saloons, although the sale of liquors is illegal.³ Under the power to "tax" and also to "restrain" the liquor traffic, a town may license it.⁴ The power in a city to tax cannot be delegated to the mayor,⁵ nor can license be refused to one who comes within the statutory conditions.⁶

Manufacturers. Taxes upon manufactures are generally excise taxes. For a time, during the civil war, nearly all manufactures were taxed by the federal government, but only a few kinds are now taxed, either by the nation or by the states. Any or all may be taxed by both.⁷

to pay a license-tax therefor: *Mandeville v. Baudot*, 49 La. An. 236.

¹ *La Norris v. State*, 13 Tex. App. 33.

² *State v. Frappart*, 31 La. An. 340.

³ *Wolf v. Lansing*, 53 Mich. 367.

See, on this subject, the cases of *State v. Hipp*, 38 Ohio St. 199; *King v. Cappeller*, 42 Ohio St. 218; *Butzman v. Whitbeck*, 42 Ohio St. 223.

⁴ *Mt. Carmel v. Wabash County*, 50 Ill. 69.

⁵ *Kinmundy v. Mahan*, 72 Ill. 462.

⁶ *Zanone v. Mound City*, 103 Ill. 552.

⁷ See *Commonwealth v. Byrne*, 20 Grat. 165. A city authorized to tax trades, professions, franchises, and incomes may impose a tax upon the manufacture and sale of ice. "Where the word 'trade' is used in defining the power to tax, the broadest signification is given to it, and it is interpreted as comprehending not only all who are engaged in buying and selling merchandise, but all whose occupation or business it is to manufacture and sell the products of their plants; it includes, in this sense, any

employment or business embarked in for trade or profit." *State v. Worth*, 116 N. C. 1007. One who buys timber and manufactures it into lumber and boards is a manufacturer, but he is not a trader. A trader buys and sells without altering in substance the form of goods brought: *State v. Chadbourne*, 80 N. C. 479. A merchant tailor who fashions suits of clothes from purchased cloth is not a manufacturer within the statute requiring manufacturers to pay license fees: *State v. Johnson*, 20 Mont. 36. A confectioner is not a manufacturer so as to be exempt from paying a confectioner's license tax: *New Orleans v. Mannessier*, 32 La. An. 1075. But one who converts hogs into bacon, lard, and cured meat is a manufacturer: *Engle v. Sohn*, 11 Ohio St. 691. A gas company is a "manufacturing company": *Commonwealth v. Lowell Gas-Light Co.*, 12 Allen 75. But an aqueduct company is not: *Dudley v. Jamaica Pond Aqueduct*

Merchants. This class of persons is often selected for taxation, and the right to tax them is unquestionable.¹ The fact that they pay taxes on their stock in trade as property does

Co., 100 Mass. 183. And see, further, *ante*, p. 704. A statute exempting from the requirement of license those who sell articles of their own manufacture confers a personal benefit only, and does not exempt an agent employed by a manufacturer to sell his goods: *State v. Rhyne*, 119 N. C. 905. Where a corporation had leased its plant, certain acts incidental to the preservation of its property were held not a transaction of business so as to render it liable to a license-tax: *State v. Anniston Rolling Mills*, 125 Ala. 121.

¹*Commonwealth v. Moore*, 25 Grat. 951. Under the power given to a city "of licensing, taxing, and regulating all such vehicles, business, and employment as the public good may require," a license may be required of all who sell goods at a fixed place of business: *Ex parte Mount*, 66 Cal. 448. A merchant tailor must pay a license fee under a statute requiring such a fee of one who "sells any goods, wares, or merchandise:" *State v. Johnson*, 20 Mont. 367. One who sells country produce from his wagon on the market square held not to be conducting a mercantile business so as to require a license: *Brown v. Commonwealth*, 98 Va. 366. A planter who sells goods on his plantation to employees only, to promote the better administration of his own business, is not liable to a merchant's tax: *Luling v. Labranche*, 30 La. An. 972. But in *Thibaut v. Kearney*, 45 La. An. 149, it was held that a planter or farmer who keeps a store on his plantation and sells goods and liquors to his employees exclusively, is within the terms of a law exacting a license from every

one "doing a business of selling at retail." One who keeps a store for the benefit of his employees, at which, however, the general public is invited to trade, is liable to a license-tax to be determined by the total amount of sales to the general public alone: *Thibaut v. Dymond*, 37 La. An. 902. As to who is liable in Mississippi for the privilege-tax "on each store," see *Folkes v. State*, 63 Miss. 81; *Harnen v. Williams*, 64 Miss. 600; *Pitts v. Vicksburg*, 72 Miss. 181; *Craig v. Pattison*, 74 Miss. 881. As to taxes on merchants in general, see *Wilmington v. Roby*, 8 Ired. 250; *Commissioners v. Patterson*, 8 Jones L. 182; *French v. Baker*, 4 Sneed 193; *Cousins v. Commonwealth*, 19 Grat. 807. Single sale held not a pursuit of the "occupation of vending medicine:" *Love v. State*, 31 Tex. Crim. App. 469. A statute imposing a license-tax on every person dealing in the selling of goods in the state, and requiring such person to take out from the treasurer of the proper county and city a license, applies only to permanent dealers in the county, and does not affect a foreign corporation having no permanent place of business in the state. Another statute provides for foreign dealers or their agents having no permanent place of business in any such city or borough: *Commonwealth v. American Tobacco Co.*, 173 Pa. St. 531. A charter provision authorizing a tax on transient merchants, or on the amount of their sales, or a property tax on their stock, held not to limit a provision authorizing a similar tax on resident merchants: *Goldsmith v. Huntsville*, 120 Ala. 182. A license to sell fertilizers manufact-

not preclude specially taxing their occupation.¹ If a merchant, paying a tax as such, adds to the occupation that of a junk-dealer, he may be taxed for that also;² but a municipality having power to tax merchants cannot by definition bring persons within the power whose occupation is not that of a merchant, as the term is properly understood and applied.³ "A dealer in the popular and, therefore, in the statutory sense of the word is not one who buys to keep or makes to sell, but one who buys to sell again."⁴ Merchants who indiscriminately

ured in a certain city would not authorize the sale of fertilizers manufactured at a distinct, incorporated municipality several miles distant from such city: *Furman Farm Imp. Co. v. Long*, 117 Ala. 581.

¹*Goldsmith v. Huntsville*, 120 Ala. 182; *Woolman v. State*, 2 Swan 353; *Aurora v. McGannon*, 138 Mo. 38; *Albertson v. Wallace*, 81 N. C. 479; *State v. Cohen*, 84 N. C. 771; *State v. Stephens*, 4 Tex. 137; *State v. Bock*, 9 Tex. 369. An ordinance imposing a tax on merchandise, and also on persons engaged in the sale of merchandise, will not, unless the ordinance imperatively requires it, be construed to authorize the collection of more than one tax on dealers in general merchandise: *Wynne v. Eastman*, 105 Ga. 614. The merchants' license-tax authorized by the Missouri statute held to be a personal-property and not an occupation-tax: *State v. Tracy*, 94 Mo. 217.

²*Hush v. Commonwealth*, 21 Grat. 785; *New Orleans v. Kaufman*, 29 La. An. 283. A merchant who sells drugs in connection with his merchandise may be required to pay both a merchants' and a druggist's license: *State v. Holmes*, 28 La. An. 765.

³*Mays v. Cincinnati*, 1 Ohio St. 268. This was a tax on hucksters.

⁴*Norris v. Commonwealth*, 27 Pa. St. 495. One who buys cattle, sheep and hogs, and seals meat, is not a

dealer in meat, and is not liable to the tax: *State v. Yearby*, 82 N. C. 561. Proprietors of a steam saw-mill, who buy timber, cut it up, and sell it as lumber, are not liable to a tax on dealers: *State v. Chadbourn*, 80 N. C. 479. One manufacturing ice and selling his product is not a "dealer" within a statute imposing a tax on wholesale dealers in ice in cities of a certain population: *Egan v. State* (Tex. Cr. App.), 68 S. W. Rep. 273. A manufacturer who sells articles manufactured by him, the articles being the product of the growth of the state, is not a "dealer" in such articles: *Taylor v. Vincent*, 12 Lea 282. But where a manufacturer is engaged as a wholesale dealer, and sells products other than those manufactured by him, he is within the law requiring a wholesale dealer's license, both as to products manufactured and sold by him, and also as to products bought on the market and sold: *Union Oil Co. v. Marrero*, 52 La. An. 357. A plumber is not a "dealer" in goods, wares, and merchandise within the meaning of laws imposing mercantile license-taxes: *Commonwealth v. Gormly*, 173 Pa. St. 586. A country merchant occasionally taking lumber or shingles in payment of a debt, or in exchange for goods kept for sale, held not subject to a tax on lumber dealers: *State v. Barnes*, 126 N. C. 1063. As to what constitutes

transact business, both as wholesale and as retail dealers, are liable to a license-tax in each capacity.¹ The tax may be graded by the amount of sales,² or by the amount of purchases,³ or by the assessed valuation of the stock as capital employed;⁴ and it contemplates that the merchant shall have a fixed place of business within a county or city—a store or shop for the sale of goods.⁵ A constitutional provision that “no article manufactured of the produce of this state shall be taxed otherwise than to pay inspection fees” does not preclude a privilege-tax upon the occupation of selling the article.⁶ A discriminating and prohibitory tax on merchants using trading stamps has been held to be unlawful.⁷ So has a statute requiring a

a “dealer in tobacco,” see *Carter v. State*, 44 Ala. 29. License duty on “dealers” in merchandise: *Commonwealth v. Teller*, 144 Pa. St. 545. License-taxes on “produce dealers:” *District of Columbia v. Oyster*, 4 Mackey 285. As to who is a “dealer in pistols,” see *Union Metallic Cartridge Co. v. Teague*, 83 Ala. 475; *Graham v. State*, 71 Miss. 208. As to who is a dealer in sewing-machines, or an agent to sell them, see *Weaver v. State*, 89 Ga. 639. A bicycle dealer who has paid the license fee is entitled to sell bicycles of as many different “makes” as he may choose, although his license specifies particular “makes”: *Alexander v. State*, 109 Ga. 805.

¹ *New Orleans v. Koehn & Co.*, 38 La. An. 328.

² *San Luis Obispo County v. Greenberg*, 120 Cal. 300; *Gatlin v. Tarboro*, 78 N. C. 119; *State v. Chapeau*, 4 S. C. 378. The first of these cases holds that a county ordinance imposing a license on merchants is not void because it imposes a penalty for the wilful understatement of the business.

³ *Albertson v. Wallace*, 81 N. C. 479; *State v. Cohen*, 84 N. C. 771.

⁴ *In re Martin (Kan.)*, 64 Pac. Rep. 43. In estimating the value of a merchant's stock for the purpose of

determining the amount of the privilege tax, cotton taken from his customers for goods sold by him to them is not to be estimated: *Harness v. Williams*, 64 Miss. 600. Under a statute requiring a merchant to file a statement of assets between the first Monday in March and the first Monday in June succeeding, the merchant is liable for the tax though he ceases doing business prior to the first Monday in June, where he continues in business after the first Monday in March: *State v. Rodecker*, 145 Mo. 450.

⁵ *Brown v. Commonwealth*, 98 Va., 366.

⁶ *Kurth v. State*, 86 Tenn. 134.

⁷ *Ex parte McKenna*, 126 Cal. 429. The tax here imposed was eight times the maximum license fee imposed on merchants not using such stamps. Nor can such a tax be sustained on the ground that it is on a lottery: *Ibid.* It was held in *Fleetwood v. Read*, 21 Wash. 547, that an ordinance imposing a license-tax on all merchants using trading stamp is not unconstitutional as a grant of special privileges, and is supported by a statute authorizing cities “to grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefor.”

license to conduct a department store.¹ In Alabama, if one has obtained a state license to sell, he may make sales through an agent.²

A merchant's license is not a contract, and the rate of taxation upon it may be changed at the pleasure of the state.³

Newspaper publishers may, without violating the constitutional provision in favor of the freedom of the press, be required to pay a license tax in respect of their business.⁴ And such a tax does not infringe a constitutional provision authorizing a tax upon business which cannot be reached by the *ad valorem* system.⁵

Officers. The United States may tax the salaries or compensation of their officers, and the states may tax those of the state officers, though neither can tax the compensation received by the officers of the other.⁶ And the state may authorize its subdivisions to tax state, county, or township offices if it shall be deemed proper to do so.⁷ Authority to tax "trades, occupations, and professions" does not authorize a tax on notaries public.⁸

Peddlers and transient dealers are commonly taxed a specific sum by the year, because they are likely to escape any other.⁹ A peddler's tax is on the occupation, not the goods, and one who engages in the business, whether as agent or owner, must

¹ State v. Ashbrook, 154 Mo. 375.

² Furman Farm Imp. Co. v. Long, 113 Ala. 203.

³ Kelly v. Dwyer, 7 Lea 180.

⁴ In re Jager, 29 S. C. 438; Norfolk v. Norfolk Landmark Pub. Co., 95 Va. 564.

⁵ Norfolk v. Norfolk Landmark Pub. Co., 95 Va. 564.

⁶ Collector v. Day, 11 Wall. 113; *ante*, pp. 129-134. The compensation of a post-office clerk has been held to be taxable by the state: Melcher v. Boston, 9 Met. 73.

⁷ Gilkeson v. Frederick Justices, 13 Grat. 577.

⁸ New Orleans v. Bienvenu, 23 La. An. 710.

⁹ For definition of "peddler," and rulings as to who may be taxed as

"peddlers," see Welton v. Missouri, 91 U. S. 282, 295; Randolph v. Yellowstone Kit, 83 Ala. 471; Hall v. State, 89 Fla. 637; Ezell v. Thrasher, 76 Ga. 817; Spencer v. Whiting, 68 Iowa 678; Kansas v. Collins, 34 Kan. 434; State v. Emert, 103 Mo. 241, 247; State v. Lee, 113 N. C. 681; State v. Gibbs, 115 N. C. 700; Range Co. v. Carver, 118 N. C. 328; State v. Franks (N. C.), 41 S. E. Rep. 785; Collier v. Burgin (N. C.), 41 S. E. Rep. 784; State v. Hodgdon, 41 Vt. 139. As to who are itinerant traders, see Burr v. Atlanta, 64 Ga. 225; Gould v. Atlanta, 55 Ga. 678. The following are cases of such taxes: Ex parte Heyleman, 92 Cal. 492; State Center v. Barenstein, 66 Iowa 249; Cherokee v. Fox, 34 Kan. 16; Carlisle v. Hech-

pay it.¹ It is held in Louisiana that the license-tax may be imposed on peddlers upon the boats navigating the public waters of the state.²

Physicians. Provision is sometimes made for the collection of a license-tax from persons engaged in the practice of medicine.³

inger, 103 Ky. 38; Keller v. State, 11 Md. 525; Brooks v. Mangan, 86 Mich. 576; Grand Rapids v. Norman, 110 Mich. 544; Rosenbloom v. State (Neb.), 89 N. W. Rep. 1053; Wynne v. Wright, 1 Dev. & Bat. 19; Cowles v. Brittain, 2 Hawks 204; Whitfield v. Longest, 6 Ired. 268; Wilmington v. Roby, 8 Ired. 250; Plymouth v. Pettyjohn, 4 Dev. 591; State v. City Council, 10 Rich. 240; State v. Pinckney, 10 Rich. 474; City Council v. Ahrens, 4 Strob. 241; Morrill v. State, 38 Wis. 428. As to who are itinerant traders, see Burr v. Atlanta, 64 Ga. 225; Gould v. Atlanta, 55 Ga. 678. The occupation of carrying clocks in a one-horse vehicle, and selling them to those disposed to buy, subjects the person pursuing the occupation to a peddler's tax and not to the tax of traveling vendors: Kirkpatrick v. Davis, 49 La. An. 871. A statute authorizing cities to enact such "ordinances, not inconsistent with the laws of the state, which shall be deemed expedient for the good government of the city, . . . benefit of trade," etc., does not authorize an ordinance requiring peddlers to procure a license: Paul v. Stoltz, 33 Minn. 233. A statute making it a misdemeanor for an itinerant vendor to sell merchandise without a license held applicable to a merchant having a permanent place of business in a city who temporarily opened a store in another town in the state: State v. Foster, 22 R. I. 163. A city ordinance requiring all peddlers and drummers to pay a license-tax is not void as discriminating against products of other states, although, as a matter of fact, few of

the residents of the city or state care to sell under it, so that, in practice, most of the revenue under it is derived from outsiders: Ex parte Hanson, 28 Fed. Rep. 127. In an ordinance providing that no person shall, without a license, peddle articles other than provisions, fish, vegetables, meat, milk, bread, and fruits (which articles were specially enumerated in addition to the general term "provisions" in earlier statutes on the subject): State v. Angelo (N. H.), 51 Atl. Rep. 905. It was held in State v. Downing, 22 Mo. App. 405, that the doctrine of principal and agent cannot be invoked by one peddling without a license. The one actually peddling must have the license.

¹ Temple v. Sumner, 51 Miss. 13; State v. Rhyne, 119 N. C. 905. The license fee required of peddlers in Wisconsin is held to be imposed under the police power: Morrill v. State, 38 Wis. 428.

² "The state," says the court, "may not levy a tax on goods merely passing through to an ultimate destination, or sent here for sale; nor on imports; but he who pursues the business of selling such goods, come whence they may, can claim no exemption from the general laws of the state, which impose the same license-taxes upon all who pursue that business, citizen of this state, or of any other state, or unnaturalized foreigner:" Cole v. Randolph, 31 La. An. 535. See also Steamer Block v. Richland, 26 La. An. 642.

³ Girard v. Bissell, 45 Kan. 66.

Railroad companies. While railway corporations are generally taxed upon their property, they are also sometimes taxed in other modes. In some states they are taxed a specific rate on their capital, in others the franchise is taxed, in others the business or profits.¹ The vehicle by means of which the business is carried on may also be taxed, when the tax does not amount to a regulation of interstate commerce.² An occupation-tax may be levied on a street railroad for its use of the streets by tracks and cars.³

¹See *State Tax on Railway Gross Receipts*, 15 Wall. 284. A statute imposing a privilege tax on railroad companies "not paying an *ad valorem* tax" is not objectionable as class legislation, though there are but two such railroad companies: *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684. The operating of a railway in a city may be taxed as a privilege: *Alabama G. S. R. Co. v. Bessemer*, 113 Ala. 668; *San Jose v. Railway Co.*, 53 Cal. 475; *Los Angeles v. Southern Pac. R. Co.*, 61 Cal. 59; *Florida Central & P. R. Co. v. Columbia*, 54 S. C. 266; *State v. McFetridge*, 56 Wis. 256. But in Georgia, under a statute reserving to the state the right to tax the property of railroads, an ordinance providing for a tax "on all railroads," was held void, as such tax was not on a business occupation but on property: *Augusta v. Central R. Co.*, 78 Ga. 119. A city charter authorizing the imposition of a license-tax on persons engaged in certain enumerated callings, and "upon any other person or employment which" the council "may deem proper, whether such person or employment be herein specifically enumerated or not," does not authorize the imposition of a tax on a railroad corporation: *Lynchburg v. Norfolk & W. R. Co.*, 80 Va. 237. A city may be empowered to impose upon each of a railroad company's two main lines running into or through the city a separate license: *Anniston v. Southern R. Co.*, 112 Ala.

557. Where two connecting lines were operated under one management, only one occupation-tax was required to be paid: *Southern R. Co. v. Greenville*, 45 S. C. 602. A railroad company does business in a city so as to be subject to a license-tax, though it has no tracks within the city, but runs its trains into the city over the tracks of another railroad company, and has for its agent therein the agent of such other company: *Florida Central & P. R. Co. v. Columbia*, 54 S. C. 266. An ordinance imposing a license-tax on "railroad companies for business done exclusively within the city" does not mean to subject thereto only those companies doing business exclusively within the city: *Ibid.* It was held in *York v. Chicago, B. & Q. R. Co.*, 56 Neb. 572, that an ordinance imposing an occupation-tax on railroad corporations transporting passengers to or from places within the city limits and any point within the state is not void as imposing a tax on a business not wholly carried on within the city imposing the tax. By granting a right of way to a railroad company "free of any claim for damages or other compensation," a city does not part with its right to impose a license-tax on this, as on other, railroad companies: *Los Angeles v. Southern Pac. R. Co.*, 67 Cal. 433.

² See *ante*, p. 162.

³ *Savannah, T. & I. H. R. v. Savannah*, 112 Ga. 164. This was held under

Telegraph and telephone companies may be required to pay license-taxes.¹

Theatrical exhibitions and shows. These are very proper subjects for special taxation, and are commonly charged either a specific tax by the year or for single representations. Such taxes call for little remark.² The business of a traveling circus

a charter giving "full power and authority to make such arrangements and levy such taxes on the inhabitants of said city and those who transact business therein." A grant by a city of a franchise to a street-railroad corporation, the grant providing the mode of construction and operation, will not be construed to deprive the city of its right to make reasonable regulations, or to impose a license-tax: *Wyandotte v. Corrigan*, 35 Kan. 21. An ordinance authorizing the construction and operation of a street railway is not to be regarded as an improper attempt to raise revenue for the city, because, in addition to requiring a license fee for each car, it also imposes an annual tax on each mile of track. The mileage-tax is not an exercise of the police power, but a condition upon the right to construct and operate the road: *Chicago General R. Co. v. Chicago*, 176 Ill. 253. For a city to condition its approval of the plan of a street-railway company for additional tracks on the company's annually paying a certain amount toward the new expenses in maintaining the streets occasioned by the presence of tracks is neither the laying of a tax nor the charging of a license fee: *Central R. etc. Co.'s Appeal*, 67 Conn. 197. A city ordinance granting to a company the exclusive privilege of operating a street railway on payment of a certain sum each year on every car run by the company does not fix a tax on its business or calling so as to render the company free from an *ad valorem* tax levied by the city under

charter provisions for an *ad valorem* tax on property within the city limits, but exempting therefrom merchants and others paying a license or specific tax on their business or calling: *Newport v. South Covington & C. St. R. Co.*, 89 Ky. 29.

¹See, as to such taxes, *Western Union Tel. Co. v. City Council*, 56 Fed. Rep. 419; *Southern Bell Tel. etc. Co. v. D'Alemberte*, 39 Fla. 25; *In re Chipchase*, 56 Kan. 357; *Western Union Tel. Co. v. Fremont*, 39 Neb. 692; *Chester v. Western Union Tel. Co.*, 154 Pa. St. 464; *Ogden City v. Crossman*, 17 Utah 66. A municipal corporation has the right to impose upon a telegraph company doing interstate business a reasonable charge as a compensation for the space occupied in its streets by the telegraph poles; but the reasonableness of any charge thus fixed is a matter for judicial investigation: *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92. It is not within a city's taxing power to impose as a "consideration for the privilege" a charge of five dollars per pole on the poles of a telephone company which has already been established under an ordinance giving it permission to erect its lines. Such a charge is not a tax on property or as a license: *New Orleans v. Great South. Tel. etc. Co.*, 40 La. An. 41.

²See *Germania v. State*, 7 Md. 1; *Orton v. Brown*, 35 Miss. 26; *New York v. Eden Musée American Co.*, 102 N. Y. 593; *Mabry v. Tarver*, 1 Humph. 94, 98; *Trapp v. White*, 35 Tex. 387. The Louisiana statute im-

is not a trade, so as to be exempt from a carriage tax imposed "in respect of any goods or burden in the course of trade."¹

Other "privilege" taxes. Where "privileges" are taxed, any occupation which is not open to all, but can only be exercised under license from some constituted authority, is to be regarded as a privilege.² The keeping of a ferry may therefore be taxed under state authority, as an occupation, even though the ferry be upon navigable waters and from a town in one state to a town in another.³ So may the operating of a railway in a city.⁴ And succession to an inheritance may be taxed as a privilege, notwithstanding the property of the estate is taxed, and taxes on property are required by the constitution of the state to be uniform.⁵ Where a tax is laid on all "pursuing any occupation, trade, or profession," one keeping a billiard-table for profit is included; though if he kept it for amusement merely he would not be.⁶ It is no objection to a tax on a business that it operates indirectly as a tax on the consumer.⁷ That may perhaps be the very reason why it has been deemed desirable to levy it. In the margin cases of busi-

posing a license for keeping a place for concert, dancing, and variety performances is constitutional: *State v. Schonhausen*, 37 La. An. 42. The license fee is not a tax on property: *Orton v. Brown*, *supra*.

¹ *Speak v. Powell*, L. R. 9 Exch. 25. A company maintaining a driving park where horse races are held annually is not liable to a tax as holding an exhibition of feats of horsemanship, or as keeping a show open to the public for pay, within the act of congress of 1864: *United States v. Buffalo Park*, 16 Blatch. 189.

² *French v. Baker*, 4 Sneed 193, 195. A wharfage tax may be levied by a city as a tax on all vessels touching at its wharves: *Marshall v. Vicksburgh*, 15 Wall. 146. Under a statute requiring that "wharf privileges, as well as wharves, shall be taxed," such privileges are to be taxed as dis-

tinct from the real and personal property with which the business of wharfing is conducted: *Galveston County v. Galveston Wharf Co.*, 72 Tex. 557.

³ *Conway v. Taylor*, 1 Black 403; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; *Chilvers v. People*, 11 Mich. 43; *Marshall v. Grimes*, 41 Miss. 27. A license fee imposed on the keeping of a ferry held not to be enforced under the taxing power: *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560.

⁴ See *ante*, p. 1121.

⁵ *Gelsthorpe v. Furnell*, 20 Mont. 299; *Eyre v. Jacob*, 14 Grat. 422. See *State v. Alston*, 94 Tenn. 674.

⁶ *Tarde v. Benseman*, 31 Tex. 277. The business-tax may be imposed though the property is taxed also: *Lewellen v. Lockharts*, 21 Grat. 570.

⁷ *Wiley v. Owens*, 39 Ind. 429.

ness or occupation taxes other than those already referred to are cited.¹

¹ Carroll v. Tuscaloosa, 12 Ala. 173; Gunter v. Leckey, 30 Ala. 591; Stewart v. Atlanta Beef Co., 93 Ga. 12; Simmons v. State, 12 Mo. 268; St. Louis v. Laughlin, 49 Mo. 559; Winston v. Taylor, 99 N. C. 210; Portland v. O'Neill, 1 Or. 218. A lumber yard, used for storing the owner's lumber, is not subject to a tax laid upon a "cotton or lumber yard or other place of storage for hire:" State v. Walker, 28 La. An. 636. One who keeps a place where he sells cigars as a regular business keeps a "cigar stand" which is liable to a privilege tax, whether he carries on such business separately or in connection with another business that is licensed: Knoxville Cigar Co. v. Cooper, 99 Tenn. 472. A city ordinance authorizing the issue of licenses to persons to sell cigarettes, upon payment of \$100, and forbidding their sale without such license, sustained: Gundling v. Chicago, 177 U. S. 183.

CHAPTER XIX.

TAXES UNDER THE POWER OF POLICE.

Taxation and regulation compared. There are some cases in which levies are made and collected under the general designation of taxes, or under some term employed in revenue laws to indicate a particular class of taxes, where the imposition of the burden may fairly be referred to some other authority than to that branch of the sovereign power of the state under which the public revenues are apportioned and collected. The reason is, that the imposition has not for its object the raising of revenue, but looks rather to the regulation of relative rights, privileges, and duties as between individuals, to the conservation of order in the political society, to the encouragement of industry, and the discouragement of pernicious employments.¹ Legislation for these purposes it would seem proper to look upon as being made in the exercise of that authority which is inherent in every sovereignty, to make all such rules and regulations as are needful to secure and preserve the public order, and to protect each individual in the enjoyment of his own rights and privileges by requiring the observance of rules of order, fairness, and good neighborhood, by all around him.² This manifestation of the sovereign authority is usually spoken of as the police power.³

¹Mr. Walker, in his *Science of Wealth*, adds this to Adam Smith's four cardinal rules of taxation: "V. The heaviest taxes should be imposed on those commodities the consumption of which is especially prejudicial to the interests of the people."

²*Gilson v. Monson*, 114 Mich. 671.

³"The term 'police power,' as understood in American constitutional law, means simply the power to impose such restraints upon private rights as are practically necessary

for the general welfare of all:" *State v. Wagener*, 77 Minn. 483. "The police power is a general term used to express the particular right of a government which is inherent in every sovereignty:" *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684. "The police power extends to the protection of the lives, health, and property of the citizens, and to the preservation of good order and public morals:" *Davock v. Moore*, 105 Mich. 120. Licenses for the regulation of occupations and not for reve-

The distinction between a demand of money under the police power and one made under the power to tax is not so much one of form as of substance.¹ The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue.² If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case and referring it to the proper power.³ But in what has been

nue can be justified only upon the ground that a necessity exists for the exercise by the state, either directly, or through delegation to municipal corporations, of the police power: *Bessette v. People*, 193 Ill. 334. In order that an ordinance to license a particular occupation, such as the business of plumbing, may be justified as an exercise of police power, it must appear that the requirement of a license tends to promote the public health, morals, safety, comfort, or welfare, or to suppress disease: *Wilkie v. Chicago*, 188 Ill. 444. A statute imposing a uniform license-tax on merchants, etc., to be fixed by a board of commissioners, and requiring two-thirds of such a tax to be paid into the city treasury, and one-third into the state treasury as a condition to the issue of a license to do business, and fixing a fine for its violation, neither tends towards the preservation of the public health, morals, safety, nor welfare, and hence cannot be sustained as a proper police regulation: *State v. Ashbrook*, 154 Mo. 375. The imposition by a city of a charge of five dollars a pole on the poles of a telephone company which has already been established under an ordinance giving it permission to erect its lines is not an exercise of the police power: *New Orleans v. Great South. Tel. etc. Co.*, 40 La. An. 41.

¹ *Philadelphia v. Contributors*, 143 Pa. St. 367.

² Taxation may be for the purpose of raising revenue, or for the purpose of regulation. When for the purpose of regulation it is an exercise of the police power of the state: *Carthage v. Rhodes*, 101 Mo. 175. See, to the same effect, *Davis v. Petrinovich*, 112 Ala. 654; *Mulcahy v. Newark*, 57 N. J. L. 513, and cases cited. Under the constitution of California a city may impose licenses for carrying on business and for revenue, or both; the former is an exercise of the police power, the latter of the taxing power: *In re Guerrero*, 69 Cal. 88. Under a power to license taxes cannot be imposed, and the power to tax does not confer the authority to license—the objects to be attained in the exercise of the two powers not being the same: *Burlington v. Bumgardner*, 42 Iowa 673. A city, under power given “to regulate streets” and “to prescribe the manner in which corporations shall exercise any privilege granted them in the use of any street,” cannot enact an ordinance imposing license fees for revenue upon a railway in the use of the streets: *Cape May v. Cape May Transp. Co.*, 64 N. J. L. 80. Under its police power a city cannot levy a tax for revenue: *Pitts v. Vicksburg*, 72 Miss. 181. To the same effect, *Mestayer v. Carrege*, 38 La. An. 707; *State v. Bean*, 91 N. C. 554.

³ *Ellis v. Frazier*, 38 Or. 462; *Philadelphia v. Contributors*, 143 Pa. St. 367.

said regarding the apportionment of taxes it has been seen that other considerations than those which regard the production of a revenue are admissible, and that regulation may be kept in view when revenue is the main and primary purpose. The right of any sovereignty to look beyond the immediate purpose to the general effect neither is nor can be disputed. The government has general authority to raise a revenue and to choose the methods of doing so; it has also general authority over the regulation of relative rights, privileges, and duties, and there is no rule of reason or policy in government which can require the legislature, when making laws with the one object in view, to exclude carefully from its attention the other. Nevertheless, cases of this nature are to be regarded as cases of taxation. Revenue is the primary purpose, and the regulation results from the methods of apportionment that are resorted to in obtaining the revenue. Only those cases where regulation is the primary purpose can be specially referred to the police power.¹

Custom has much to do in determining whether certain classes of exactions are to be regarded as taxes or as duties imposed for regulation. If, by the common understanding and general custom of the country, a particular duty is regarded as being imposed upon certain individuals, not as their proportionate share in the burdens of government, but because of some special relation to property peculiarly located, or to business peculiarly troublesome or dangerous, so that a requirement that the duty shall be performed by such individuals is usually regarded as only in the nature of regulation of relative obligations and duties through the neighborhood or the municipality, there is no sufficient reason why this may not be con-

¹ *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151. It is not a valid objection to a city ordinance imposing a license fee for selling cigarettes that it partakes both of the character of a regulation and also of that of an excise tax: *Gundling v. Chicago*, 177 U. S. 183. Where a tax is partly for revenue and partly under the state's police power, it must conform to the limitations upon the taxing power,

except so far as a departure is necessary to make it regulative or prohibitive: *San Francisco v. Liverpool, etc. Co.*, 74 Cal. 113. An ordinance providing for public weighing, and fixing a scale of prices therefor, from which source the city derived a revenue, was held not invalid because it was for the purpose of raising revenue: *St. Charles v. Elsner*, 155 Mo. 671.

sidered a mere police regulation, though the proceedings assume the form of taxation, and are even designated by that name.¹ The summoning of the people once a year to put the highways of their neighborhood in order has sometimes been looked upon as a case of this description; to some extent, at least, in the nature of a police regulation,² notwithstanding that, on a failure to obey the summons, the value of the labor is collected in money. A public purpose, such as is usually accomplished by an expenditure of public moneys, is indeed had in view in such a case; but the custom of requiring highway labor seems to have come down to us from a period when regular taxes were unknown or only collected in kind, and when it was looked upon as a neighborhood duty to keep the roads in order, as it was also to prevent riots and arrest criminals, or make compensation for their offenses. A like practice, based upon a similar idea, has prevailed in other countries.³

Sidewalk assessments. The cases of assessments for the construction of walks by the side of the streets in cities and

¹ *State v. Fowler*, 22 R. I. 163. A statute authorizing a city to levy assessments on real property abutting on a street to pay for improvements made on such street is not an exercise or delegation of the power of taxation, but is an exercise of the police power of the state in regard to the opening and repairing of streets and highways: *Trustees v. Atlanta*, 76 Ga. 181. A statute authorizing the abatement of a nuisance at the expense of the property on which it exists held not to impose a special tax within the meaning of the constitution relating to special taxation for local improvements. It is not a tax or assessment at all, but a warranted exercise of the police power: *Horbach v. Omaha*, 54 Neb. 33. But where the statute requires notice to the owner, and entitles him to an opportunity to do the work — grading and filling lots, etc., — himself, and notice is not served, the assessment is void: *Ibid*. And a special tax assessed by a city

on a citizen's lot to pay the costs of abating a nuisance created by the municipality on the lot will not be sustained: *Lasbury v. McCague*, 56 Neb. 220.

² See *State v. Halifax*, 4 Dev. Law 345; *Sawyer v. Alton*, 3 Scam. 127, 130; *Pleasant v. Kost*, 29 Ill. 490; *Overseers of Amenia v. Stamford*, 6 Johns. 92; *Draining Company Case*, 11 La. An. 338, 372.

³ A license fee for the right to collect tolls for the use of one's own wharf is in a large sense a tax, "as being a charge or burden imposed upon persons, property, or business to raise money for public purposes:" *Santa Barbara v. Stearns*, 51 Cal. 499. Where a city has granted the privilege to supply water to its people without let or hindrance, the water-works are taxable as property, but a license fee cannot then be imposed on the privilege of supplying the water: *Stein v. Mobile*, 49 Ala. 362; *Mobile v. Stein*, 54 Ala. 23.

other populous places are more distinctly referable to the power of police.¹ These foot-walks are not only required, as a rule, to be put and kept in proper condition for use by the adjacent proprietors, but it is quite customary to confer by the municipal charters full authority upon the municipalities to order the walks of a kind and quality by them prescribed to be constructed by the owners of adjacent lots at their own expense, within a time limited by the order for the purpose, and, in case of their failure so to construct them, to provide that it shall be done by the public authorities, and the cost collected from such owners or made a lien upon their property. When this is the law the duty must be looked upon as being enjoined as a regulation of police, because of the peculiar interest such owners have in the walks, and because their situation gives them peculiar fitness and ability for performing, with promptness and convenience, the duty of putting them in proper state, and of afterwards keeping them in a condition suitable for use. Upon these grounds the authority to establish such regulations has been supported with little dissent.²

No doubt this requirement is sometimes in a measure oppressive, since the actual cost may exceed the pecuniary advantages to the lot-owner;³ but this, in the case of police regulations,

¹ *Philadelphia v. Contributors*, 143 Pa. St. 367.

² *Renken v. Fuehring*, 130 Ind. 382. The leading case is *Godard Petitioner*, 16 Pick. 504, where the subject is examined at length. The following cases support the same view: *Palmer v. Way*, 6 Colo. 106; *Pueblo v. Robinson*, 12 Colo. 593; *White v. People*, 94 Ill. 604, explaining *Ottawa v. Spencer*, 40 Ill. 211; *Sloan v. Beebe*, 24 Kan. 343; *Hydes v. Joyes*, 4 Bush 464; *O'Leary v. Sloo*, 7 La. An. 125; *Lowell v. Hadley*, 8 Met. 180; *Flint v. Webb*, 25 Minn. 93; *Macon v. Patty*, 57 Miss. 378; *Kemper v. King*, 11 Mo. App. 116; *Paxson v. Sweet*, 13 N. J. L. 196; *Buffalo City Cemetery Co. v. Buffalo*, 46 N. Y. 503; *Hart v. Brooklyn*, 36 Barb. 226; *Bonsall v. Leb-*

anon, 19 Ohio 27; *Greensburgh v. Young*, 53 Pa. St. 280; *Deblois v. Barker*, 4 R. I. 445; *Washington v. Nashville*, 1 Swan 177; *Whyte v. Nashville*, 2 Swan 364; *Franklin v. Mayberry*, 6 Humph. 368; *Wilson v. Phillippi*, 39 W. Va. 75. And see *Hudler v. Golden*, 36 N. Y. 446; *Woodbridge v. Detroit*, 8 Mich. 274, 309. Under a charter authorizing a city to cause and procure all streets and sidewalks to be graded, and to compel the abutting owners to pay the expense thereof, it cannot compel an abutting owner to raise the sidewalk, but can only compel him to pay for doing it: *Arndt v. Cullman* (Ala.), 31 South. Rep. 478.

³ In New Jersey, where it is held that the assessment for an improvement on the adjoining land-owners

is never a conclusive objection.¹ It has been held competent to order a sidewalk constructed on one side of a street when none is ordered on the other;² and to order it even though the street is not as yet graded;³ and to collect the cost before the walk is built.⁴ And the owner of a corner lot may be required to pave the sidewalk on each of the streets.⁵ In New Jersey it is held that the lot-owner, in case the street is unpaved, may be required, as a part of the expense of the walk, to construct a gutter necessary for its security.⁶

Sewer assessments. There seems to be no legal impediment to a requirement under the police power that lot-owners in cities and villages shall be at the expense of constructing that portion of the public sewer in front of their respective premises.⁷ It is true that the levies for the purpose of constructing sewers and of keeping them in repair are commonly spoken of as taxes;⁸ but, as has been justly remarked, there is

must not exceed the *actual* benefit conferred by such improvement, it is also held that the whole expense of a sidewalk may be assessed upon the lot in front of which it is constructed, regardless of absolute benefits: *Van Tassel v. Jersey City*, 37 N. J. L. 128. And see *Dewey v. Des Moines*, 101 Iowa 416, and cases cited.

¹ *Speer v. Athens*, 85 Ga. 49.

² *State v. Portage*, 12 Wis. 562.

³ *Parker v. Challiss*, 9 Kan. 155, 11 Kan. 384.

⁴ *Mix v. Shaw*, 106 Ill. 425.

⁵ *Sands v. Richmond*, 31 Grat. 571. See *Wolf v. Keokuk*, 48 Iowa 129. In *Twycross v. Fitchburg R. Co.*, 10 Gray 293, 295, a lessee's covenant to pay "all taxes or duties," levied or to be levied on the premises during the term, was held not to apply to an assessment for paving the sidewalk in front; that not being a tax or duty levied or to be levied on the premises demised. "It is a permanent improvement of the estate, the benefit of which is to be found in the increased value of the estate, and in the increased rent which it

would permanently command." Per *Thomas, J.* In Illinois it is held not competent to make the cost of the sidewalk a personal charge against the owner: *Craw v. Tolono*, 96 Ill. 255; *Virginia v. Hall*, 96 Ill. 278.

⁶ *Robins v. New Brunswick*, 44 N. J. 116. In *Williams v. Bruce*, 5 Conn. 190, it was decided that the building of a railing on the inner side of a sidewalk could not be compelled under a general authority to require the sidewalk to be constructed. In *Wright v. Briggs*, 2 Hill 77, it was held that authority to a village council to require adjoining owners to construct sidewalks in front of their premises would not warrant imposing upon them a tax for improving the street. A power in a municipal charter to "regulate and improve" sidewalks does not authorize an assessment for their construction: *Fairfield v. Ratcliffe*, 20 Iowa 396.

⁷ *Van Wagoner v. Paterson* (N. J.), 51 Atl. Rep. 922.

⁸ See *Philadelphia v. Tryon*, 35 Pa. St. 401; *Stroud v. Philadelphia*, 61

as much reason to subject the owners of land abutting to contribution to their expenditure, as there is to oblige them to pave the footways in front of their grounds, or to keep the same in repair, when the city shall pave the streets adjoining. It should be a charge on the land, just as is the requisition on the owners of land abutting on the streets to clear away the snow at their own expense, which has been determined to be a reasonable provision. It is a charge upon real estate thus situated, and requisite for the comfort and convenience of all the citizens.¹ By this is not meant that the expense of sewers may not be borne by general tax, as indeed is often done; what is meant is only this: that the purpose to be accomplished is of that peculiar nature that the duty to provide for it seems intimately associated with the ownership of adjacent property, the value of which will be increased and the use facilitated by means thereof; and it is therefore within the competency of the legislature to impose upon the owners of such property the duty to make provision for it.²

Levee assessments. Assessments for the construction of embankments or levees, to protect from overflow and destruction large tracts of country, are commonly levied on the owners of lands bordering on or lying near the streams or bodies of water from which the danger is anticipated, and are generally looked upon as a species of local tax.³ But if it should be imposed as a duty upon residents or property owners in the neighborhood of such a danger, that they should turn out periodically, or in emergencies, and give personal attention and labor to the construction of the necessary defenses against overflow and inundation, it is not perceived that there could be any difficulty in supporting such a requirement as one of police, or of resting it

Pa. St. 255; *Boston v. Shaw*, 1 Met. 130; *Hildreth v. Lowell*, 11 Gray 345; *Cone v. Hartford*, 28 Conn. 363; *State v. Jersey City*, 29 N. J. 441; *State v. Charleston*, 12 Rich. 702, 733.

¹ *Putnam, J.*, in *Boston v. Shaw*, 1 Met. 130, 138. In this case it is decided that the levy of a sewer rate by the value of estates is void, as it could not be equal or just.

² *Van Wagoner v. Paterson* (N. J.), 51 Atl. Rep. 922.

³ *Crowley v. Cropley*, 2 La. An. 329. See *Sessions v. Cronklinton*, 20 Ohio St. 349; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *Yeatman v. Crandall*, 11 La. An. 220; *Wallace v. Shelton*, 14 La. An. 498; *Bishop v. Marks*, 15 La. An. 147; *Richardson v. Morgan*, 16 La. An. 429; *McGehee v. Mathis*, 21 Ark. 40; *Jones v. Boston*, 104 Mass. 461.

upon the same grounds which sustain the regulations in cities, by which duties are imposed on the occupants of buildings to take certain precautions against fires, not for their own benefit exclusively, but for the protection of the public.¹

Drainage laws. Similar considerations apply in the case of drainage laws, which are enacted in order to relieve swamps, marshes, and other low lands of the excessive waters which detract from their value for occupation and cultivation, and perhaps render them worthless for use, and are likely at the same time to diffuse through the neighborhood a dangerous nuisance. If these may be drained at the expense of the owner, by special tax, there can be no doubt of the right of the state to make it his duty to drain them, as a matter of police regulation;² the state coming forward to perform the duty at his expense, in case of its not being suitably or expeditiously performed by himself.³

¹ It is said by *Elmer, J.*, in *State v. Newark*, 27 N. J. L. 185, 194, that "laws for the drainage and embanking of low grounds, and to provide for the expense for the mere benefit of the proprietors, without reference to the public good, are to be classed, not under the taxing but the police power of the government; and so also the regulation of fences and party-walls." To the same effect is *Boro v. Phillips Co.*, 4 Dill. 216. In that case the acts in question provided for paying for all levee work by assessment on the land benefited, and declared that other lands and property in the county should not be taxed for the purpose. Held, that the county at large was not liable though the county court had failed in its duty to levy a tax upon the benefited lands to pay for work done. The liability rests solely on the levee districts.

² *Lien v. Board of Com'rs*, 80 Minn. 58. Assessment of benefits for drainage that is for private advantage, not for public utility, is not within the

police power: *Gifford Draining Dist. v. Schroer*, 145 Ind. 572.

³ In *State v. Charleston*, 12 Rich. 702, 733, the power to require sewers, drains, and sidewalks to be constructed by the owners of the property adjacent is plainly referred to the police power. "From a very early period sewers and pavements have constituted exceptional subjects in reference to assessments. Statutes of drains and sewers were known before the time of Henry VIII., when the general statutes on the subject were enacted, and the mode of assessment prescribed. In like manner the act of 1764 provided for assessments for drains or sewers and sidewalks. Various reasons have been assigned for these exceptions. Among others, it has been plainly urged that, as a sanitary regulation, and under the power to abate nuisances, the corporation might require every citizen to drain his own lot, or, in case of neglect, exact a penalty; and so by the old act of 1698 (7 Stat. 12), every inhabitant of Charleston

It is not to be doubted that other cases which may not have yet been the subject of judicial consideration would fall within the same reasons; but it might be presumptuous to attempt an enumeration of them, especially as there can be little or no occasion for doing so, when the taxing power is commonly sufficient to meet all their requirements. A safer ground will be occupied in the consideration of those cases, so often the subject of judicial review, in which burdens in the shape of license fees have been imposed upon business, trades, or occupations.

License fees in general.—License fees may be imposed: 1. For regulation. 2. For revenue. 3. To give monopolies. 4. For prohibition.¹ The third purpose is inadmissible in any free government, and has not avowedly been had in view at any time in this country, nor in England since the period immediately preceding the revolution of 1688, so fruitful of arbitrary exactions of every available nature.² The fourth purpose is entirely admissible in the case of pursuits or indulgences which in their general effect are believed to be more harmful than beneficial to society, and which, consequently, the public interest requires should be put an end to. A case of this nature is that of heavy fees imposed on the keepers of imple-

was required to mend and raise the sidewalk in front of his house in the manner and to the dimensions therein prescribed, on penalty of forfeiting for each house a penalty to be collected under the warrant of a justice of the peace. In order the better to carry into effect these objects, and to do what each individual might be required to do for himself, the act of 1764 authorized the commissioners of streets to construct drains and level and pave the footways, etc., and to assess the proprietors of lands and houses fronting on the street," etc. *Dunkin*, Chancellor, p. 733.

¹ *Bassette v. People*, 193 Ill. 334.

² Taxation for the benefit of individuals is compared to monopolies by *Lowrie*, Ch. J., in *Philadelphia*

Association, etc. v. Wood, 39 Pa. St. 67, 82. The very heavy license fees exacted from pawnbrokers in Dublin are said to owe their origin to a purpose to give a monopoly of the business to a few favored retainers of the court. Of course the weight of such fees rests finally on the persons whose necessities make them the pawnbroker's customers. A power to license and regulate will not warrant the conferring of a license upon one person to carry on a business to the exclusion of all others. But a power to license and refuse licenses will: *Logan v. Pyne*, 43 Iowa 524; *Burlington v. Davis*, 48 Iowa 133. The legislature may give a city the right to grant an exclusive ferry license: *Ibid*.

ments of gaming.¹ When, however, prohibition is the object, the end may generally be more directly accomplished by legislation which in its terms is prohibitory, than by the circuitous method of imposing a burden difficult or impossible to be borne; and the direct method is consequently the one usually adopted.² But it is often found that the prohibition of an occupation which excites or gratifies the vices or passions of large numbers of people is met by a resistance so steady and powerful as to render the law wholly ineffectual, when a heavy tax might lessen the evils and possibly in the end make the occupation unprofitable. A belief that this might be the result has influenced many persons to favor a repeal of the prohibitory liquor laws, and the substitution therefor of laws for the regulation and taxation of the traffic. And this is held to be competent even when the business taxed is one the legislature is forbidden by the constitution to license; the tax not necessarily implying either protection to the business by the state or consent to its being carried on.³

¹State v. Doon, R. M. Charl. 1. The fee in this case was of \$1,000, and it was sustained, although it was manifestly imposed for the purposes of prohibition, and its payment would not give to the owner of the table the privilege of making use of it, which was illegal under another statute. The constitution of Arkansas of 1868 provided that "the general assembly shall tax all privileges, pursuits, and occupations that are of no real use to society; all others shall be exempt." Art. 10, § 179. Two constitutional provisions were as follows:

"No political corporation shall impose a greater license than is imposed by the general assembly for state purposes.

"The regulation of the sale of alcoholic or spirituous liquors is declared a police regulation, and the general assembly may enact laws regulating their sale and use." A parish had undertaken to require a higher license fee from a liquor seller

than had the state, on the ground that such larger fee was as a police regulation. Held, that the second provision quoted did not relate to the sale of liquors, but only to such regulations as the preservation of order, etc., may require, and that the action of the parish was not warranted: State v. Chase, 33 La. An. 287. Under authority to a municipality to impose a license-tax on a coffee house where theatrical plays are performed, the amount of the tax is a question of expediency and police regulation of which the municipal authorities are sole judges. A tax of \$2,500 sustained. The keeper of the house has a right to require only that all who pursue the same business shall pay the same amount of tax: Goldsmith v. New Orleans, 31 La. An. 646.

²Morton v. Macon, 111 Ga. 162.

³Taxation imposed upon an unlawful business will not be construed to operate as a license legalizing such unlawful business: Palmer v. State,

In general, however, prohibition is not the purpose in mind when license fees or similar burdens are imposed; but the state has in view either the regulation of that in respect of

88 Tenn. 563: *Blaufield v. State*, 103 Tenn. 593. In the latter case a tax imposed by a statute upon the privilege of selling cigarettes "not sold in violation of criminal law" was held not to give the licensee a right to sell in violation of a prior statute making the sale of cigarettes a misdemeanor. A license-tax may be required for the privilege of selling publications immoral in their nature: *Thompson v. State*, 17 Tex. App. 253. "The popular understanding of the word 'license' undoubtedly is a permission to do something which, without the license, would not be allowable. This, we suppose, was the sense in which it was made use of in the constitution: but this is also the legal meaning. The object of a license, says Mr. Justice *Manning*, is to confer a right that does not exist without a license: *Chilvers v. People*, 11 Mich. 43, 49. Within this definition a mere tax upon the traffic cannot be a license of the traffic, unless the tax confers some right to carry on the traffic which otherwise would not have existed. We do not understand that such is the case here. The very act which imposed this tax repealed the previous law which forbade the traffic and declared it illegal. The trade then became lawful whether taxed or not; and this law in imposing the tax did not declare the trade illegal in case the tax was not paid. So far as we can perceive, a failure to pay the tax no more renders the trade illegal than would a like failure of a farmer, to pay the tax on his farm, render its cultivation illegal. The state has imposed the tax in each case, and made such provision as has been deemed needful to insure its payment; but it has

not seen fit to make the failure to pay a forfeiture of the right to pursue the calling. If the tax is paid the traffic is lawful, but if not paid the traffic is equally lawful. There is consequently nothing in the case that appears to be in the nature of a license. The state has provided for the taxation of a business which was found in existence, and the carrying on of which it no longer prohibits; and that is all. But it is urged that by taxing the business the state recognizes its lawful character, sanctions its existence, and participates in its profits, all of which is within the real intent of the prohibition of license. The lawfulness of the business, if by that we understand it is no longer punishable, and is capable of constituting the basis of contracts, was undoubtedly recognized when the prohibitory law was repealed; but as the illegality of the traffic depended on the law, so its lawfulness now depends upon its repeal. The tax has nothing to do with it whatever. Now it is not claimed, so far as we are aware, that the repeal of the prohibitory law was incompetent; and, if not, mere recognition of the lawfulness of the traffic cannot make the tax-law or any other law invalid. It is only the recognition of an existing and a conceded fact; and the courts could not refuse to recognize it if they would. The idea that the state lends its countenance to any particular traffic by taxing it seems to rest upon a very transparent fallacy. It certainly overlooks or disregards some ideas that must always underlie taxation. Taxes are not favors; they are burdens. They are necessary, it is true, to the existence of government; but

which the exaction is made, or it contemplates a revenue therefrom; and it may intend both regulation and revenue. The requirement of a license fee, as a condition to carrying on an

they are not the less burdens, and are only submitted to because of the necessity. It is deemed advisable to make careful provision to preclude these burdens becoming needlessly oppressive; but it is conceded by all the authorities that under some circumstances they may be carried to an extent that will be ruinous to individuals. It would be a remarkable proposition, under such circumstances, that a thing is sanctioned and countenanced by the government, when this burden, which may prove disastrous, is imposed upon it, while on the other hand it is frowned upon and condemned when the burden is withheld. It is safe to predict that if such were the legal doctrine, any citizen would prefer to be visited with the untaxed frowns of government rather than with testimonials of approval, which are represented by the demands of the tax-gatherer. It may be supposed that some idea of special protection is involved when a business is taxed; taxation and protection being reciprocal. If the tax upon any particular thing was the consideration for the thing given to the owner in respect to it, this might be so; but the maxim of reciprocity in taxation has no such meaning. No government ever undertakes to tax all it protects. If the government were to levy only poll-taxes, it would not be on the idea that it was to protect only the persons of its citizens, leaving their property open to rapine and plunder. In this state our taxes are derived mainly from real estate; but it has never been suggested that real estate was entitled to special consideration in consequence. In Great Britain real estate pays a relatively

insignificant portion of the taxes, although in the social and political state it is more important than any other property. As a general fact the United States has not taxed real property, and though during the recent rebellion it taxed most kinds of business for war purposes, the number of subjects taxed has been several times reduced by legislation since, and may reasonably be expected to be further reduced hereafter. But the business taxed is no more protected than the business not taxed; and the fisheries which are favored by bounties are as much protected as either. All this is only an apportionment of taxation by the selection of subjects which, under all the circumstances, it is deemed wise and politic to subject to the burden. Whether a person in respect to his property or his occupation falls within the category of taxables, or not, is immaterial as affecting his claim to protection from the government. It is enough for him that the government has selected for itself its own subjects for taxation, and prescribed its own rules. It is his liability to taxation at the will of the government that entitles him to protection, and not the circumstance of his being actually taxed; and the taxation of a thing may be, and often is, when police purposes are had in view, a means of expressing disapproval instead of approbation of what is taxed. . . . Taxes upon business are usually collected in the form of license fees; and this may possibly have led to the idea that seems to have prevailed in some quarters, that a tax implied a license. But there is no necessary connection whatever between them. A business

occupation requiring regulation, cannot be objected to as a restraint of trade, however necessary may be the employment; and the legislature must be the judge when regulation is needful.¹

A license is a privilege granted by the state, usually on payment of a valuable consideration,² though this is not essential. To constitute a privilege the grant must confer authority to do something which without the grant would be illegal; for if what is to be done under the license is open to every one without it, the grant would be merely idle and nugatory, conferring no privilege whatever.³ But the thing to be done may be some-

may be licensed and yet not taxed, or it may be taxed and yet not licensed. And so far is the tax from being necessarily a license, that provision is frequently made by law for the taxation of a business that is carried on under a license existing independent of the tax. Such is the case where cities under proper legislative authority tax occupations that are carried on under licenses from the state: *Ould v. Richmond*, 23 Grat. 464; *Napier v. Hodges*, 31 Tex. 287; *Cuthbert v. Conley*, 32 Ga. 211; *Wendover v. Lexington*, 15 B. Monr. 258. The license confers the privilege, but it is not perceived why a privilege thus conferred should not be taxed as much as any other. The federal laws give us illustration of the taxation of illegal traffic. A case in point was that of the taxation of the liquor traffic in the state previous to the repeal of the prohibitory law; the federal law found a business in existence and taxed it without undertaking to give it any protection whatever: *McGuire v. Commonwealth*, 3 Wall. 387; *Pervear v. Commonwealth*, 5 Wall. 475; *Youngblood v. Sexton*, 32 Mich. 406. Compare *State v. Bixman*, 162 Mo. 1; *State v. Hipp*, 38 Ohio St. 129; *State v. Frame*, 39 Ohio St. 399; *Butzman v. Whitbeck*, 42 Ohio St. 223; *State v. Sinks*,

42 Ohio St. 345; *Adler v. Whitbeck*, 44 Ohio St. 539. And see *Richland County v. Richland Center*, 59 Wis. 591. The statute allowing damages to be recovered for injuries resulting from the sale of liquor is not repugnant to a law taxing the sale: *Kehrig v. Peters*, 21 Mich. 475. "License, in general, implies privilege and regulation, and the imposition of it falls within the police power of the state; but the charge of a license fee against a business or occupation, commendable and necessary for the public good, which, in effect, is prohibitory of such business or occupation, is void as an unlawful exercise of such power: *Matthews v. Jensen*, 21 Utah 207.

¹ *Brooklyn v. Breslin*, 57 N. Y. 591 (case of a city cartman).

² *Heise v. Columbia*, 6 Rich. 404. A license is a restrictive special tax imposed for the public good and in the exercise of the police power of the state: *Emerich v. Indianapolis*, 118 Ind. 279.

³ *Chicago v. Collins*, 175 Ill. 445; *Home Ins. Co. v. Augusta*, 50 Ga. 530; *Chilvers v. People*, 11 Mich. 43, 49; *Pleuler v. State*, 11 Neb. 547; *State v. Hipp*, 38 Ohio St. 129; *Adler v. Whitbeck*, 44 Ohio St. 539. A mere tax imposed upon a business or occupation is not a license unless the

thing lawful in itself, and only prohibited for the purposes of the license; that is to say, prohibited in order to compel the taking out of a license.¹ This is always the case where that which is licensed was not unlawful at the common law.

The grant of a license may be made by the state directly, or it may be made indirectly through one of the municipal corporations of the state. Of the indirect grant it is to be observed that a municipal corporation as such has no inherent power to grant licenses or exact license fees; it must derive all its authority in this regard from the state, and the power must come by direct grant and cannot be taken by implication.²

Fees, when a tax. The terms in which a municipality is empowered to grant licenses will be expected to indicate with

levy confers a right or privilege as to the business that would not otherwise exist: *Matthews v. Jensen*, 21 Utah 207. The imposition of a license-tax is in the nature of a sale of a benefit or privilege to a person who otherwise would not be entitled to the same: *Leavenworth v. Booth*, 15 Kan. 627. See *State v. Frame*, 39 Ohio St. 399. Where a municipal corporation has power to prohibit the doing of a thing and also the power to license the same thing to be done, the license fee demanded for the doing of such a thing is not a tax, but a price paid for the privilege, and funds raised from such fees may be applied to schools if the corporation shall so determine, though by the constitution municipal taxes are required to be applied to municipal purposes: *East St. Louis v. Trustees of Schools*, 102 Ill. 489.

¹ How far the grant of a patent by the United States precludes state regulations in respect to the sale of the patented article, see *Patterson v. Kentucky*, 97 U. S. 501; *Hollida v. Hunt*, 70 Ill. 109; *Helm v. National Bank*, 43 Ind. 167; *Commonwealth v. Petty*, 96 Ky. 452; *Cranston v. Smith*, 37 Mich. 309; *Crittenden v. White*, 23 Minn. 24; and see *ante*, pp. 141, 142.

² *Matthews v. Jensen*, 21 Utah 207. This case holds that a statute giving the power to license must be construed with great strictness, and that any doubt or ambiguity arising out of the language must be resolved in favor of the public. A municipality cannot, without legislative authority, impose a license fee upon a ten-pin alley: *Goetler v. State*, 45 Ark. 454. A daily tax of twenty-five cents for keeping a butcher shop is a license-tax, and the right to impose it exists only when there is express power granted to lay a revenue license-tax: *Delcambre v. Clere*, 34 La. An. 1050. A license fee of \$300 cannot be imposed on auctioneers under the police power, nor can they be taxed by license without clear authority: *Mankato v. Fowler*, 32 Minn. 364, citing *St. Paul v. Traeger*, 25 Minn. 248. The statute providing for the examination of plumbers and for the granting of certificates which shall be valid throughout the state, controls the entire subject, and a city cannot require holders of certificates granted under such law to pay an additional license fee imposed by ordinance: *Wilkie v. Chicago*, 188 Ill. 444. And further as to requirement of both state and municipal licenses, see *ante*, pp. 1099, 1100.

sufficient precision whether the grant is conferred for the purposes of revenue, or whether, on the other hand, it is given for regulation merely. It is perhaps impossible to lay down any rule for the construction of such grants that shall be general and at the same time safe; but as all delegated powers to tax are to be closely scanned and strictly construed, it would seem that when a power to license is given, the intendment must be that regulation is the object, unless there is something in the language of the grant, or in the circumstances under which it is made, indicating with sufficient certainty that the raising of revenue by means thereof was contemplated.¹ If a

¹ *Bassette v. People*, 193 Ill. 334; *St. Louis v. Boatmen's Ins. & T. Co.*, 47 Mo. 150; *Mulcahy v. Newark*, 57 N. J. L. 513; *Matthews v. Jensen*, 21 Utah 207. The good faith and reasonableness of a charge imposed upon banks by a city ordinance under a law authorizing the licensing of banks, being conceded, it will be presumed to be a license as it purports to be, and not a tax for revenue: *Oil City v. Oil City Trust Co.*, 151 Pa. St. 454. A license fee upon the occupation of horseshoeing held to be imposed for purposes of regulation, and not for revenue: *Bassette v. People*, 193 Ill. 334. The words "license tax" may be construed as synonymous with "license fee or charge," for the former words do not necessarily and always mean a license-tax assessed and collected for purposes of revenue: *Ex parte Pfirman* (Cal.), 66 Pac. Rep. 205. The fact that the license fee is payable into the municipality's treasury does not, provided the fee is a reasonable one, impress it with the character of a tax: *State v. Herod*, 29 Iowa 123; *Frankford, etc. R. Co. v. Philadelphia*, 58 Pa. St. 119; *Johnson v. Philadelphia*, 60 Pa. St. 445. Upon the question when a license fee imposed on the cars of street railways is a tax and when not, the following cases may be consulted in connection with the Pennsylvania cases above cited: *New York v. Second Av. R. Co.*, 32 N. Y. 261; *Louisville City R. Co. v. Louisville*, 4 Bush 478. An ordinance which, under a certain statute, in express terms fixes a license fee for auctions and auctioneers (no reference being made to revenue), and which also, under another law, fixes a license fee for various employments which cannot be taxed for revenue, must be held to be an exercise of the police power only, under both laws: *State v. Atlantic City* (N. J.), 50 Atl. Rep. 367. City ordinances imposing a license-tax on ferry privileges, and requiring a bond conditioned for faithful performance of duties and for payment of damages for injuries caused by the licensee's negligence, show an intention to regulate; and a payment required thereunder for that purpose is not a tax, but a license fee or price for the privilege: *Arkadelphia Lumber Co. v. Arkadelphia*, 56 Ark. 370. A city charter providing that the common council may require transient dealers to obtain license before engaging in business, and may regulate the terms of issuing the same, does not confer authority to tax the business, but merely to license it to the end that it may be regulated: *Saginaw v. Saginaw Circuit Judge*, 106 Mich. 32. A city's authority to provide for the

revenue authority is what seems to be conferred,¹ the extent of the tax, when not limited by the grant itself, must be understood to be left to the judgment and discretion of the municipal government, to be determined in the usual mode in which its legislative authority is exercised; but the grant of authority to impose fees for the purposes of revenue would not warrant their being made so heavy as to be prohibitory, thereby defeating the purpose.²

inspection, and to regulate the sale, of meats and other things, does not authorize a tax for revenue upon the occupation of selling them, but justifies such fees and charges as will cover the expense of inspection and police supervision: *Jackson v. Ledwith*, 26 Fla. 163. Provisions for the licensing of public taverns with an annual tax of not less than ten dollars nor more than \$100 were held to be a valid exercise of the police power, and not to impose a tax in contravention of a constitutional provision that the general assembly should tax all privileges and occupations that are of no real use to society, and that all others should be exempt: *Bostick v. State*, 47 Ark. 126. It was decided in *East St. Louis v. Wider*, 46 Ill. 351, that a license fee required of merchants could not be discharged by a tender of evidences of indebtedness of the police commissioners, though that indebtedness was made receivable for *taxes*.

¹To determine whether, by the terms "license and regulate," in a municipal charter, it was intended to authorize licenses for the purpose of raising revenue, the whole charter and the general legislation of the state upon the subject must be considered: *Ex parte Frank*, 52 Cal. 606; *San Jose v. Railway Co.*, 53 Cal. 476. Intention to delegate the licensing power as a revenue measure may be deduced from a legislative declaration that the amount of the license fee shall be at the discretion

of the municipality, or that the proceeds of licenses shall be appropriated to municipal uses beyond the expense of licensing and regulating the thing licensed: *Mulcahy v. Newark*, 57 N. J. L. 513, and cases cited. A statute taxing vehicles was held to be a law taxing privileges rather than a police regulation: *Memphis v. American Express Co.*, 102 Tenn. 336. See *Ellis v. Frazier*, 38 Or. 462. A city ordinance which provides that telegraph companies or agencies shall each, for doing business within the city, and not including business done to or from points without the state, and not including any business done for the federal government, pay an annual tax of \$500, imposes a tax: *Western Union Tel. Co. v. City Council*, 56 Fed. Rep. 419. A charge assessed against non-residents for grazing cattle within the state, held a tax for revenue and not a license-tax; and it cannot be sustained as a proper exercise of the police power: *Kiowa County Com'rs v. Dunn*, 21 Colo. 185. A license fee of forty dollars on hackmen, not being for expense, etc., of regulation, must be deemed a tax: *Jackson v. Newman*, 59 Miss. 385.

²*Ex parte Burnett*, 30 Ala. 461; *Craig v. Burnett*, 32 Ala. 728; *Morton v. Macon*, 111 Ga. 162; *Burlington v. Insurance Co.*, 31 Iowa 102; *Lyons v. Cooper*, 39 Kan. 324; *Mason v. Lancaster*, 4 Bush 406; *Kniper v. Louisville*, 7 Bush 599; *Kitson v. Ann Arbor*, 26 Mich. 325; *Stull v. De*

Where the grant is not made for revenue, but for regulation merely, a much narrower construction is to be applied. A fee for the license may still be exacted, but it must be such a fee only as will legitimately assist in the regulation; and it should not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business which it covers.¹ If the state intends to give broader authority, it is

Mattos, 23 Wash. 71. A city ordinance requiring traveling vendors of drugs who accompany the offer of their wares with public exhibitions to pay a license fee of fifty dollars a day, held not unreasonable or extortionate: *Walla Walla v. Ferdon*, 21 Wash. 308. It is only when the license fee is exacted solely as a police regulation that the court can consider whether it is so unreasonable as to amount to a prohibition, and that only as to vocations which cannot be so prohibited: *State v. Hunt* (N. C.), 40 S. E. Rep. 216.

¹ *Ward v. Maryland*, 12 Wall. 429; *Mobile v. Yuille*, 3 Ala. 137; *State v. Herod*, 29 Iowa 123; *Burlington v. Insurance Co.*, 31 Iowa 102; *Collins v. Louisville*, 2 B. Monr. 134; *State v. Roberts*, 11 Gill & J. 506; *Van Sant v. Stage Co.*, 59 Md. 330; *Boston v. Schaffer*, 9 Pick. 415; *Commonwealth v. Stodder*, 2 Cush. 562; *Childers v. People*, 11 Mich. 43; *Ash v. People*, 11 Mich. 347; *St. Louis v. Boatmen's Ins. & Trust Co.*, 47 Mo. 150; *State v. Angelo* (N. H.), 51 Atl. Rep. 905; *Freeholders v. Barber*, 7 N. J. L. 64; *Kip v. Paterson*, 26 N. J. L. 298; *State v. Hoboken*, 33 N. J. L. 280; *North Hudson County R. Co. v. Hoboken*, 41 N. J. L. 71; *Mulcahy v. Newark*, 57 N. J. L. 513; *Cape May v. Cape May Transp. Co.*, 64 N. J. L. 80; *Margolies v. Atlantic City* (N. J.), 50 Atl. Rep. 367; *State v. Bean*, 91 N. C. 554; *Cincinnati v. Bryson*, 15 Ohio 625; *Mays v. Cincinnati*, 1 Ohio St. 268; *Baker v. Cincinnati*, 11 Ohio St. 534; *Cincinnati*

Gas-Light Co. v. State, 18 Ohio St. 237; *Bennett v. Birmingham*, 31 Pa. St. 15. It has been held in Arkansas that if a police regulation is directed to the end of raising a revenue, a court of equity may declare it void to the extent that it imposes fees which exceed reasonable costs and expenses: *Taylor v. Pine Bluff*, 34 Ark. 603. Power given a city to regulate wash-houses includes the power to license them; but twenty dollars for a yearly license is too much, however, and should be deemed a tax, and, therefore, invalid: *In re Wan Yin*, 22 Fed. Rep. 701. A license charge, imposed by ordinance, of one dollar per year for each telegraph pole erected in a city, is not so unreasonable as to justify judicial interference with the discretion of the municipal officers: *Chester v. Western Union Tel. Co.*, 154 Pa. St. 464. A charge imposed by city ordinance of one dollar per pole and two dollars and a half on each mile of wire upon a telegraph company occupying streets with its poles, charges being removed from wires placed underground, is not a tax, but a reasonable exercise of the police power: *Philadelphia v. Postal Tel. Cable Co.*, 67 Hun 21. A city ordinance providing that the license for keeping a bar, saloon, or other place where intoxicating liquors are sold shall be thirty dollars per quarter, except that in for such places where a female acts as bartender, actress, dancer, singer, etc., the license shall be \$150 per month, is

a reasonable inference that it will do so in unequivocal terms.¹ But the limitation of the license fee to the necessary expenses will still leave a considerable field for the exercise of discretion when the amount of the fee is to be determined. The fee, of course, must be prescribed in advance, and when it cannot be determined with any accuracy what the cost of regulation is to be: it must therefore be based upon the estimates, with more or less probability that the result will fail to come anything near a verification of the calculations. Moreover, in fixing upon the fee, it is proper and reasonable to take into account not the expense merely of direct regulation, but all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed. In some cases the incidental consequences are much the most important, and, indeed, are what are principally had in view when the fee is decided upon. The regulation of the business of huckster, for instance, could seldom be troublesome or expensive, but that of the manufacture and sale of intoxicating drinks could not be measured by anything like the same standard. The business is one that affects the public interest in many ways, and leads to many disorders. It has a powerful tendency to increase pauperism and crime. It renders a large force of peace officers essential, and it adds to the expenses of the courts, and of nearly all branches of civil administration. It cannot be questioned, therefore, if it is to be licensed by the public authorities, that it is legitimate and proper to take into

not unfair or unreasonable: *Ex parte Felchin*, 96 Cal. 360. A license fee of eight dollars for an annual hack license was, in *Ex parte Gregory*, 20 Tex. App. 210, sustained, not as authorized as a tax, but as not unreasonable. See, also, *State v. French*, 17 Mont. 54. Power to regulate the business of auctioneers cannot sustain an ordinance requiring of them a license fee of twenty-five dollars a day: *Stull v. De Mattos* (Wash.), 62 Pac. Rep. 451. The requirements of an ordinance that a pawnbroker pay a yearly license of fifty dollars, and give a bond for \$5,000, and that junk dealers and

dealers in second-hand goods pay a twenty-five dollar license and give a \$2,000 bond, are not unreasonable: *Grand Rapids v. Braudy*, 105 Mich. 670. The requirement of a license fee of \$2,500 for selling goods at auction is unreasonable and illegal: *Margolies v. Atlantic City* (N. J.), 50 Atl. Rep. 367. The right to license gives a municipality authority to impose such a charge as will cover not only the necessary expense of issuing it, but also the additional labor of officers, but nothing beyond: *Jacksonville v. Ledwith*, 26 Fla. 163.

¹*State v. Angelo* (N. H.), 51 Atl. Rep. 905; *State v. Foster*, 22 R. I. 163.

the account all the probable consequences, or that the payment to be exacted should be sufficient to cover all the incidental expenses to which the public are likely to be put by means of the business being carried on. And all reasonable intendments must favor the fairness and justice of a fee thus fixed; it will not be held excessive unless it is manifestly something more than a fee or regulation.¹

What may be licensed. Upon this subject it would not be safe to venture upon laying down any rule whatever, as one of limitation. Where revenue is the purpose, enough has been said in other parts of the present work to show that there is practically no limitation whatever. When the license is for regulation merely, the limitation is one of discretion and policy, and the question presented is, whether the business or occupation is one rendering special regulation important for any purpose of protection to the public, or to guard individuals against

¹ See *Burlington v. Insurance Co.*, 31 Iowa 102; *Ash v. People*, 11 Mich. 347; *People v. Van Baalen*, 40 Mich. 258; *People v. Russell*, 49 Mich. 617; *Johnson v. Philadelphia*, 60 Pa. St. 445. In proper cases, where a license is fixed, while the fee is designed to defray the expenses of regulation, it is no objection to the license that incidentally a revenue is also obtained, if the license be uniform and equal as to all subjects engaged in the business, and, under the circumstances, not wholly unreasonable: *Matthews v. Jensen*, 21 Utah 207. In *Burch v. Savannah*, 42 Ga. 596, 598, the following remarks are made by *McKay, J.*: "The license fee for retailing liquors is in no sense a tax. Its object is not to raise revenue. It has for many years been thought that this business was one dangerous to the public peace and public morals, and it has been the uniform practice of the country to subject it to regulation, require license from some public functionary before it is engaged in, and to punish as a crime the pursuit of it without a license. The license is part of the public regulations of the country, and the fee is intended rather to prevent the indiscriminate opening of such establishments than to raise the revenue by taxation." And see *Straub v. Gordon*, 27 Ark. 625; *Denehy v. Chicago*, 126 Ill. 627; *Thomasson v. State*, 15 Ind. 449; *Falmouth v. Watson*, 5 Bush 660; *Commonwealth v. Byrne*, 20 Grat. 165. An ordinance requiring payment of a license fee of thirteen dollars per month for carrying on the business of a retail liquor-dealer is not unreasonable: *Los Angeles County v. Eikenberry* (Cal.), 63 Pac. Rep. 766. The objection to a license fee exacted of saloon-keepers, etc., that it is unequal and invidious, because the rest of the community is not required to pay similar fees, has no force: *Durach's Appeal*, 62 Pa. St. 491. Neither has an objection that those taxed are not assessed according to the business done: *Youngblood v. Sexton*, 33 Mich. 406.

frauds and impositions.¹ Employments the most necessary and commendable may sometimes need regulations for one or the other of these purposes, and so may the most dearly prized and most essential of fundamental rights or privileges. On this point no illustration could be more appropriate than that of the marriage relation. Marriage, between persons of suitable age and discretion, and under proper circumstances, should be esteemed a natural right; but what are suitable age and discretion, and what are the circumstances which should allow or forbid it? There are some cases in which it is as manifestly unfit and pernicious as in others it is proper and suitable; and obviously legislation is essential. In most countries the relation has always been subjected to regulations more or less stringent, among which has been the requirement of a license. Such a license has commonly for its purpose to prevent marriages between persons disqualified by immaturity or mental infirmity, or against the will of those standing in such relation to the parties as to render it proper and reasonable that they should be consulted.

Public amusements may also, with entire propriety, be forbidden except when licensed, inasmuch as everything of that nature has some tendency to disorder and to increased necessity for police supervision.² Perhaps those private amusements in which chance is one of the elements of interest, and which for that reason may beget a desire for gaming, and thus lead

¹ "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be, and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the exercise of the police power of the state:" *Gundling v. Chicago*, 177 U. S. 183. "The legislature of the state is not without power to impose a tax on a business in the form of a license fee, when it deems such to be warranted by considerations of public interest and for the general welfare; and the only

limitation upon its exercise of power in that respect is that there shall be no discrimination or oppression, and that the burden shall be charged equally upon all persons in similar circumstances:" *Fire Department v. Stanton*, 159 N. Y. 225.

² See *Sears v. West*, 1 Murphy 291; *The Germania v. State*, 7 Md. 1; *Orton v. Brown*, 35 Miss. 426; *Mabry v. Tarver*, 1 Humph. 94; *Hodges v. Nashville*, 2 Humph. 61; *Robertson v. Heneger*, 5 Sneed 257. The fee for the license of a place of amusement may well be graduated by the town's population: *State v. O'Hara*, 36 La. An. 93.

to disorders, might also be subjected to regulations of a like nature. The whole subject must be one which presents questions of legislative policy, rather than of strict law.¹

Lotteries, where permitted, are usually licensed, and sometimes the state which grants the permission and receives a fee therefor permits its municipalities to exact a license fee also. This it has an undoubted right to do, unless the privilege was obtained from the state on the payment of a bonus, and under legislation which, in terms or by fair construction, would preclude any municipal regulations or exactions.² Games of chance or hazard of every description, when made lawful at all, are usually made so under licensed regulations.³ And though a tax is sometimes levied for revenue upon the keepers of dogs, it is more usual to require the keeping to be licensed; the principal object being to have some person responsible for every animal of the kind that is protected by the law.⁴

¹In *Stevens v. State*, 2 Ark. 291, it was held that the keeper of a billiard-table could not be required to pay a fee as for a privilege. This was put on the wholly untenable ground that it was unequal, because he was taxed on the table as property; and it was overruled by *Washington v. State*, 13 Ark. 572. See *Straub v. Gordon*, 27 Ark. 625. A license to two persons to keep a pool-table is available to either of them: *Hinckley v. Germania F. Ins. Co.*, 140 Mass. 38.

²*Wendover v. Lexington*, 15 B. Monr. 258.

³See *Washington v. State*, 13 Ark. 752; *State v. Hay*, 29 Me. 457; *Commonwealth v. Colton*, 8 Gray 488; *State v. Freeman*, 38 N. H. 426; *Tanner v. Albion*, 5 Hill 121; *Lewellen v. Lockharts*, 21 Grat. 570. If the state imposes a license-tax upon an occupation — *e. g.*, the keeping of a gaming-table, it is precluded from treating it as a misdemeanor: *Overby v. State*, 18 Fla. 178.

⁴See *Mitchell v. Williams*, 27 Ind. 62; *Blair v. Forehand*, 100 Mass. 136; *Carthage v. Rhodes*, 101 Mo. 175; *Morey v. Brown*, 42 N. H. 373; *Carter*

v. Dow, 16 Wis. 298; *Tenney v. Lenz*, 16 Wis. 567. It is within the police power of the state to enact that no dog shall be entitled to the protection of the law unless placed upon the assessment rolls: *Sentell v. New Orleans, etc. R. Co.*, 166 U. S. 698. Under a statute authorizing cities to impose a license-tax for corporate purposes, and to pass such ordinances as are necessary to enforce them, a city is empowered to impose a tax for the privilege of keeping a dog: *Hill v. Abbeville (S. C.)*, 38 S. E. Rep. 11. A specific tax for the privilege of keeping a dog may be imposed, and it may be provided that, on failure to pay, the dog shall be killed. The Indiana statute for the taxing of dogs construed: *Shelby v. Randles*, 57 Ind. 390. The tax is levied for regulation and restriction, and not merely for revenue. A fee to be paid upon the registration of each dog is a tax, but it is not the kind of a tax contemplated in a constitutional requirement that the legislature shall provide for a uniform and equal rate of assessment and taxation: *State v. Topeka*, 36 Kan. 76. That a constitu-

Of the occupations upon which license fees are usually imposed, the most conspicuous has already been mentioned; that, namely, of the manufacture and vending of spirituous and malt liquors.¹ Few persons dispute the necessity for the regulation by law of this business; when the legislation has gone to the extent of the entire prohibition, the judiciary has not deemed itself competent to interfere.²

tional provision for the taxation of dogs by value will not preclude a *per capita* tax on dogs, see *Woolf v. Chalker*, 31 Conn. 121; *Cole v. Hall*, 103 Ill. 30; *Van Horn v. People*, 46 Mich. 183; *Holst v. Roe*, 39 Ohio St. 340; *Ex parte Cooper*, 3 Tex. App. 489, and the cases cited *supra*. *Contra*, *Washington v. Meigs*, 1 MacA. 53; *Mowery v. Salisbury*, 82 N. C. 175.

¹ In *Keller v. State*, 11 Md. 525, an act requiring manufacturers of beer to take out a license for retailing was objected to as compelling them to pay more than their fair proportion towards the expense of the government; but the court say, "the system of legislation to which this act belongs may be vindicated on the plainest grounds of public policy." As to the right in general, see *License Cases*, 5 How. 504; *License-Tax Cases*, 5 Wall. 472; *Reymann Brewing Co. v. Brister*, 179 U. S. 445; *Perdue v. Ellis*, 18 Ga. 586; *Gardner v. People*, 20 Ill. 430; *Dennehy v. Chicago*, 120 Ill. 627; *Thomasson v. State*, 15 Ind. 449; *Smith v. Adrian*, 1 Mich. 495; *In re Bickerstaff*, 70 Cal. 35; *Aulanier v. Governor*, 1 Tex. 653. Under its power to make local and police regulations, a city may impose an annual license-tax of \$200 on the business of selling liquor, and may make it a misdemeanor to sell without a license: *Ex parte McNally*, 73 Cal. 632. In Texas a fee of \$250 required of retailers of liquors has been sustained as only a regulation of police, and not a tax: *Baker v. Panola*

County, 30 Tex. 86. A city, under its power "to tax, license, and regulate" brewers, distillers, etc., may require a license of \$500 for each brewery and for each distillery; such a charge is not a "tax" in the constitutional sense: *United States Dist. Co. v. Chicago*, 112 Ill. 19. The statute in relation to the traffic in liquors, and for the taxation and regulation of the same, and to provide for "local option," is an exercise of the police power, and not a tax-law, though by its short title it is called the "Liquor-Tax Law:" *People v. Murray*, 4 App. Div. (N. Y.) 185, 38 N. Y. Supp. 909. The payment of a license-tax imposed by a city ordinance as a retail-liquor dealer does not exempt the licensee from paying a tax imposed by a county ordinance for carrying on the same business: *Los Angeles County v. Eikenberry*, 131 Cal. 461. In Indiana a city may require a liquor license from one having a state license to sell: *Frankfort v. Aughe*, 114 Ind. 77.

² The general law of the state prohibiting the sale of intoxicating liquors without license is not abrogated, even as to the particular locality, by the fact that under a village charter the council alone is authorized to grant licenses, and is alone vested with authority to restrain, regulate, and control "to the entire exclusion of any control or right to regulate or restrain, in said matters, by any board, officer, person, or municipality of this county:" *State v. Nolan*, 37 Minn. 16. Under a city charter

Illustrations of other occupations commonly supposed to require special regulations are those of hackmen, draymen, hawkers, auctioneers, etc.¹ A license fee imposed upon "all transient persons keeping stores" in the town imposing it has been sustained as a police regulation, though called a tax in the legislation which permitted it.² It is within the police power to require license for selling agricultural products on commission,³ or for conducting gift, fire, and bankrupt sales;⁴

conferring power to license and regulate retail liquor-selling, to annul and revoke licenses for cause shown, to close up retail establishments for such time as might be deemed necessary, to prevent liquor-selling whenever deemed expedient, etc., it is held that the sale of liquor might absolutely be prohibited: *In re Jones*, 78 Ala. 419. In Illinois it has been held that the corporate authorities of towns, when empowered by their charters to suppress the sale of intoxicating liquors, might declare the unlicensed selling a nuisance: *Goodard v. Jacksonville*, 15 Ill. 588; *Byers v. Olney*, 16 Ill. 35; *Jacksonville v. Holland*, 19 Ill. 271; *Pekin v. Smelzel*, 21 Ill. 464; *Block v. Jacksonville*, 36 Ill. 301.

¹ *Hall v. State*, 39 Fla. 637; *Scudder v. Hinshaw*, 134 Ind. 56; *Nightingale. Petitioner*, 11 Pick. 163; *Grand Rapids v. Norman*, 110 Mich. 544; *State v. Wagener*, 69 Minn. 206; *Buffalo v. Webster*, 10 Wend. 99; *Brooklyn v. Breslin*, 57 N. Y. 591; *State v. Morrell*, 100 N. C. 506; *Cincinnati v. Bryson*, 15 Ohio 625; *White v. Kent*, 11 Ohio St. 550; *Adams v. Somerville*, 2 Head 363; *State v. Crawford*, 2 Head 460; *Morrill v. State*, 38 Wis. 428. In *State v. Wagener*, *supra*, a statute purporting to license and regulate hawkers and peddlers, but making an arbitrary distinction and an improper classification was held to be invalid. Under a power to enact ordinances necessary to promote the peace, good order,

benefit, and advantage of a borough, an ordinance is valid which requires licenses or a fine from canvassers from house to house for the sale of books, pictures, groceries, clothing, etc.: *Warren v. Geer*, 117 Pa. St. 207. A statute requiring itinerant venders to take out a state and a local license upon heavy fees, and to deposit \$1,000 before selling their goods, is not against public policy and void as being in restraint of trade, but is within the legitimate scope of police power: *State v. Foster*, 22 R. I. 163. On the other hand, statutes and ordinances which, in requiring license fees to be paid by hawkers and peddlers, unjustly discriminate in favor of residents, have been held void: *Brooks v. Mangan*, 86 Mich. 576; *Sayre v. Phillips*, 148 Pa. St. 482; *Shamokin Borough v. Flannigan*, 156 Pa. St. 43. See *Clements v. Casper*, 4 Wyo. 494. A statute forbidding sales by sample in Louisville without a license was sustained against constitutional objections in *Commonwealth v. Smith*, 6 Bush 303; *Mark v. Commonwealth*, 6 Bush 397.

² *Wilmington v. Roby*, 8 Ired. 250. See *Wilmington v. Patterson*, 8 Jones Law 182.

³ *State v. Wagener*, 77 Minn. 483.

⁴ *Mines v. Schoenig*, 72 Minn. 528. An ordinance taxing such sales twenty-five dollars per month does not impose an unreasonable license fee; and the council need not grant a license for part of a month at a proportionate rate: *Ibid*.

or for keeping victualing shops;¹ or for packing or canning oysters.² The license of vehicles has been sustained under this power;³ so has the license of street-railway cars,⁴ and of skiffs and row-boats.⁵ Under this power also the payment of a license fee for doing insurance may be required;⁶ and the payment of a reasonable sum for the expense of issuing and recording licenses regulating the sale of explosives may be exacted.⁷ One to whom a permit is issued for constructing a building may be charged therefor a reasonable sum graduated according to the cost of the building.⁸ A city may be empowered to exact a license from every meat-packing establishment in it or within a mile of its limits.⁹ The erection in city streets of tanks to supply water for street sprinkling may be licensed.¹⁰ A license-tax may, under the police power, be required from persons residing on boats on navigable rivers.¹¹ A heavy license fee on the removal and disinterment of a dead body from the place of interment has been sustained.¹² Inspection fees are to be referred to the police power, and are not taxes.¹³

¹ *St. Johnsbury v. Thompson*, 59 Vt. 300.

² *Applegarth v. State*, 89 Md. 140.

³ *Fort Smith v. Ayers*, 43 Ark. 82; *Bowser v. Thompson*, 103 Ky. 331.

⁴ *Frankford, etc. R. Co. v. Philadelphia*, 58 Pa. St. 119; *Johnson v. Philadelphia*, 60 Pa. St. 445; *State v. Herod*, 29 Iowa 123. Railroad companies may be required to light such part of their track as is within a city or village, and on failure the cost may be made a lien on their real estate: *Cincinnati, etc. R. Co. v. Sullivan*, 32 Ohio St. 152.

⁵ *Poyer v. Desplaines*, 22 Ill. App. 576.

⁶ *Fire Department v. Helfenstein*, 16 Wis. 136. An ordinance provided for a license fee of \$100 to be paid by every person or company doing an insurance business in the city. Held, that although more than the cost of issuing the license, the amount was collectible: *Leavenworth v. Booth*, 15 Kan. 627. Where

the law imposes a special tax on foreign insurance companies, and a tax on all insurance companies, the two taxes may be collected from the former class: *Leavenworth v. Booth*, *supra*. It is not duplicate taxation to require a license both from an insurance company and from an agent who works for it: *Farmington v. Rutherford* (Mo. App.), 68 S. W. Rep. 83.

⁷ *New York v. Miller*, 12 Daly 496.

⁸ *St. Paul v. Dow*, 37 Minn. 20.

⁹ *Chicago Packing, etc. Co. v. Chicago*, 88 Ill. 221.

¹⁰ *Savage v. Salem*, 23 Or. 381.

¹¹ *Robertson v. Commonwealth*, 101 Ky. 285.

¹² *In re Wong Yung Quy*, 6 Sawy. 442.

¹³ *Charleston v. Rogers*, 2 McCord 495; *O'Maley v. Freeport*, 96 Pa. St. 24. An ordinance requiring all telegraph poles within the city to be inspected by the police department, and licensed, and imposing a fee of

A license-tax on a business in a city for the benefit of the county in which it is, if regarded as a police regulation, may be upheld though not uniform throughout the district, since the price of the license may be graduated by the populousness of the community, or by the profitableness of the business licensed.¹ It has been decided that the police power cannot support the singling out by ordinance of one industry — for example, that of sheep-raising — and requiring a license-tax of so much per thousand sheep to be paid in respect of it, where no regulation or protection of the business is required or afforded by the ordinance.²

Issuing the license. This is usually done by some administrative officer or board under general regulations. It has been held in Georgia that one applying for a license is entitled to it of right if he complies with the statutory conditions.³ But this cannot be universally true. In some cases the purpose of the legislation is to limit the number, and then a discretion will be allowed to grant or refuse, just as is done in England in the case of applicants for license to sell liquors. In others the regulations are often made exceedingly stringent. In addition to the payment of the tax a bond for good behavior is often required, and sometimes a satisfactory showing of good moral character.⁴

one dollar per annum for each pole, is reasonable, and discloses no abuse of discretion warranting judicial interference: *Western Union Tel. Co. v. Philadelphia*, 148 Pa. St. 117.

¹ *Ex parte Marshall*, 64 Ala. 266.

² *Matthews v. Jansen*, 21 Utah 207.

³ *State v. Justices*, 15 Ga. 408; *Hill v. Decatur*, 22 Ga. 203.

⁴ In *Whitten v. Covington*, 43 Ga. 421, a requirement that the applicant for a license should produce the recommendation of four of his nearest neighbors — a requirement not always possible to comply with — was sustained. A recommendation that a license be granted to two persons cannot be taken to recommend a license to one of them: *State v. Erb*, 47 N. J. L. 92. The order of a

county court to its clerk to issue to an applicant a license to retail spirituous liquors does not, of itself, entitle the applicant to retail, but only authorizes the issue of the license after the applicant has complied with all the prerequisites of the law: *Brown v. State*, 27 Tex. 335. The exclusive power to grant a license includes, it was held in *Carroll v. Campbell*, 25 Mo. App. 630, the power to withhold a license, and thus make the license granted exclusive of all others. But in Michigan the right to a license to sell liquor is fixed by the legislature, and a city or village council has no discretion beyond that which the statute confers. In passing upon the sufficiency of sureties the council has no

Recalling licenses. Under some statutes licenses are permitted to be recalled or revoked for the misbehavior of those who hold them. This in some cases is a very salutary power. They are subject also, like all other statutory privileges, to be terminated by changes in the laws. Thus a retailer's license is terminated by a law totally prohibiting sales.¹ So, a license to sell liquors is not a contract or grant, but a mere permit or police regulation, which may be changed or even annulled whenever the public welfare demands it, and which does not preclude the licensee's being required to pay a different or larger fee or tax for the unexpired term.² Some courts have been inclined to hold that a license cannot, unless for misconduct, be revoked except on a return of the fee;³ and certainly repayment would generally be equitable.

right to disregard affidavits without legal proof, or to reject sureties arbitrarily. An abuse of discretion may be remedied by *mandamus*: *Potter v. Homer*, 59 Mich. 8. Where a license had been refused erroneously, except on payment of a county tax in addition to the privilege tax imposed by statute, the party nevertheless was not justified in doing business without license, the remedy being by *mandamus* to compel the issue of the license: *Phoenix Carpet Co. v. State*, 118 Ala. 143.

¹See, on this subject, *Phalen v. Virginia*, 8 How. 163; *Butler v. Pennsylvania*, 10 How. 402; *License-Tax Cases*, 5 Wall. 462; *Home Ins. Co. v. Augusta*, 93 U. S. 116; *Stone v. Mississippi*, 101 U. S. 814; *Bishoff v. State (Fla.)*, 30 South. Rep. 808; *Brown v. State (Ga.)*, 7 S. E. Rep. 915; *Gatzwiller v. People*, 14 Ill. 142; *Fell v. State*, 42 Md. 71; *Calder v. Kurby*, 5 Gray 597; *Baker v. Boston*, 12 Pick. 184; *Brimmer v. Boston*, 102 Mass. 19; *Commonwealth v. Brennan*, 103 Mass. 70; *Freleigh v. State*, 8 Mo. 606; *State v. Sterling*, 8 Mo. 697; *Simmons v. State*, 12 Mo. 268; *Pleuler v. State*, 11 Neb. 547; *Martin v.*

State, 23 Neb. 371; *State v. Holmes*, 88 N. Y. 225; *Brick Presb. Church v. New York*, 5 Cow. 538; *Vanderbilt v. Adams*, 7 Cow. 585; *People v. Morris*, 13 Wend. 325; *Board of Excise v. Barrie*, 34 N. Y. 657; *Hirn v. State*, 1 Ohio St. 15. Where a city has power to suppress the sale of liquors it may revoke a license for failure to observe an ordinance: *Schwuchow v. Chicago*, 68 Ill. 444.

²*McKinney v. Salem*, 77 Ind. 213; *State v. Bonnell*, 119 Ind. 494; *Moore v. Indianapolis*, 120 Ind. 483; *State v. Gerhardt*, 145 Ind. 439. A liquor license is not a contract precluding the state from declaring the license void and requiring the licensee to pay a tax: *Kresser v. Lyman*, 74 Fed. Rep. 765. The fact that a saloon-keeper has complied with all the provisions of a tax-law before an amendment to it became operative does not give him a vested right to sell under the conditions of the former law. The legislature may amend the law so as to prohibit sales on legal holidays, and the fact of previous payment of the tax will not excuse disobedience: *Reithmiller v. People*, 44 Mich. 280.

³See *Boyd v. State*, 46 Ala. 329;

Collection of license fees. What has already been said regarding the collection of taxes will preclude the necessity for any extended remarks regarding the collection of these fees. As has been remarked, the payment is usually required in advance. If they are not paid, and the privilege is nevertheless exercised, the statute or ordinance imposing the fee will determine what the consequence shall be, and what proceedings shall be taken. It has been decided that a municipal corporation empowered to grant licenses and to impose a fee therefor may lawfully make the failure to take out a license and pay the fee subject the offender to the penalty of fine and imprisonment.¹ An agent may be prosecuted for engaging in a business for which his principal has not taken out a license.² It has been held that a complaint to recover a license-tax imposed by an ordinance need not set out the ordinance, but need merely state its substance and aver its violation.³ Inasmuch as the burden of proving his license is upon one who is complained of for keeping a billiard table without a license, it has been considered immaterial that the complaint does not deny that he had such a license.⁴ And it has been held that an

State v. Phalen, 3 Harr. 441; *Adams v. Hackett*, 27 N. H. 289, 294. Where a person has erected, under a license from the city, water tanks in a city's streets for street sprinkling, the license cannot be revoked and the tanks removed without notice to him: *Savage v. Salem*, 23 Or. 381. In the state of Washington the unearned part of license money is recoverable when the licensed business is prohibited: *Pearson v. Seattle*, 14 Wash. 438.

¹ See *Shelton v. Mobile*, 30 Ala. 540; *Vandine*, Petitioner, 6 Pick. 187; *Nightingale*, Petitioner, 11 Pick. 168; *Chilvers v. People*, 11 Mich. 43; *Brooklyn v. Cleves*, *Lalor* 231; *St. Louis v. Sternberg*, 69 Mo. 289; *St. Louis v. Green*, 70 Mo. 562; *Buffalo v. Webster*, 10 Wend. 99; *Cincinnati v. Buckingham*, 10 Ohio 257; *White v. Kent*, 11 Ohio St. 550; *State v. Hayne*, 4 S. C. 403. *Contra*, *Butler's Appeal*, 73 Pa. St. 448. Although the

city of Macon cannot enforce the collection of a license-tax by imprisonment, or punish a person for his mere failure to pay, it may pass and enforce an ordinance making it an offense to do business in the city without procuring license required by a valid ordinance: *Johnson v. Mayor (Ga.)*, 40 S. E. Rep. 322. In Nebraska cases holding that penal provisions of an occupation tax-law cannot be enforced have recently been overruled: *Rosenbloom v. State (Neb.)*, 89 N. W. Rep. 1053.

² *Nashville, C. & St. L. R. Co. v. Attalia*, 118 Ala. 362, and cases cited.

³ *Nashville, C. & St. L. R. Co. v. Alabama City (Ala.)*, 32 South. Rep. 731.

⁴ *Commonwealth v. McCarty*, 141 Mass. 420. In a prosecution for selling without a license the defendant has the burden of showing that he is protected by a license: *State v. Morrison*, 126 N. C. 1123.

ordinance imposing a fine for each offense of carrying on business without a license does not authorize fining a person each and every day until he pays the tax.¹

Federal licenses. The licenses issued by the federal government for revenue purposes do not supersede state regulations, and consequently must be received subject to all such requirements of license fees as the state may have seen fit to impose.² The federal government does not issue licenses under the police power, but may do so in some cases under the power to regulate commerce, and in the exercise of other federal powers; but such cases seem to call for no special remark.

¹ *Nashville, C. & St. L. R. Co. v. Attalia*, 118 Ala. 362. 20 Iowa 82; *State v. Stutz*, 20 Iowa 488; *Commonwealth v. Thorniley*, 6

² *McGuire v. Commonwealth*, 3 Allen 445; *Commonwealth v. Holbrook*, 10 Allen 200; *Commonwealth v. Keenan*, 11 Allen 262. *Pervear v. Commonwealth*, 5 Wall. 475; *Black v. Jeffersonville*, 36 Ill. 301; *State v. Carney*,

CHAPTER XX.

TAXATION BY SPECIAL ASSESSMENT.

A very important species of taxation is that which is laid in the form of special assessments.¹ This is done upon a system the general principles of which have long been recognized and acted upon in England, though perhaps not to so great an extent, nor with such distinct recognition of the proper sphere for its application, as they now are in the American states.

It will be convenient to consider the general subject of special assessments under the following heads:

1. The principles which underlie them.
2. The cases in which it is customary to levy them.
3. The objections which are made to them in point of policy.
4. The objections which constitutional principles or provisions are sometimes thought to oppose.
5. The principles of apportionment.
6. The proceedings in levying and collecting them.

1. The principles underlying them. Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply universally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed, beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that

¹ *Dalrymple v. Milwaukee*, 53 Wis. valid exercise of the taxing power: 178. Laws authorizing the levy of *Raleigh v. Peace*, 110 N. C. 82. local or special assessments are a

special contributions, in consideration of the special benefit, shall be made by the persons receiving it.¹ The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay.² This is the idea that underlies all these levies. The distinction between them and ordinary taxation has thus been pointed out in a recent case: "A local assessment can only be levied on land; it cannot, as a tax can, be made a personal liability of the taxpayer; it is an assessment on the thing supposed to be benefited. A tax is levied on the whole state or a known political subdivision, as a county or a town. A local assessment is levied on property situated in a district created for the express purpose of the levy, and possessing no other function, or even existence, than to be the thing on which the levy is made. A tax is a continuing burden and must be collected at stated short intervals for all time, and without it government cannot exist; a local assessment is exceptional both as to time and locality,—it is brought into being for a particular occasion, and to accomplish a particular purpose, and dies with the passing of the occasion and the accomplishment of the purpose. A tax is levied, collected, and administered by a public agency, elected

¹ *Denver v. Knowles*, 17 Colo. 204; *Simpson v. Kansas City*, 46 Kan. 438; *Daly v. Morgan*, 69 Md. 460; *In re Morewood Av.*, 159 Pa. St. 20; *Senor v. Board of Com'rs*, 13 Wash. 48. An assessment is a tax upon property, levied according to benefits conferred on the property: *Adler v. Whitbeck*, 44 Ohio St. 539. "The whole theory of a special assessment is based on the doctrine that the property against which it is levied derives some special benefit from the improvement:" *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112 Iowa 300. "If we look for the technical or legal meaning of the phrase 'local improvement,' we shall find it to be

a public improvement, which, although it may incidentally benefit the public at large, is made primarily for the accommodation and convenience of the inhabitants of a particular locality, and which is of such a nature as to confer a special benefit upon the real property adjoining or near the locality of the improvement:" *Crane v. Siloam Springs*, 67 Ark. 30, citing *Little Rock v. Katzenstein*, 52 Ark. 107.

² *McLean Co. v. Bloomington*, 106 Ill. 209; *Illinois Central R. Co. v. Decatur*, 126 Ill. 92; *Huston v. Tribbetts*, 171 Ill. 547; *Brooks v. Baltimore*, 48 Md. 265.

by and responsible to the community upon which it is imposed: a local assessment is made by an authority *ab extra*. Yet it is like a tax in that it is imposed under an authority derived from the legislature, and is an enforced contribution to the public welfare, and its payment may be enforced by the summary method allowed for the collection of taxes. It is like a tax in that it must be levied for a public purpose, and must be apportioned by some reasonable rule among those upon whose property it is levied. It is unlike a tax in that the proceeds of the assessment must be expended in an improvement from which a benefit clearly exceptive and plainly perceived must inure to the property upon which it is imposed.”¹ Not all these differences are necessarily existent in every case, but in the main the characterization is accurate as it is forcible.

It will sometimes happen in the case of special assessments, as it does occasionally with all other taxation, that the expenditure will fail to realize the expectation on which the levy is made; and it may thus appear that a special assessment has been laid when justice would have required the levy of a general tax;² but the liability of a principle to erroneous or defective application cannot demonstrate the unsoundness of the principle itself; and that which supports special assessments is believed to be firmly based in reason and justice.³

¹ *George*, Ch. J., in *Macon v. Patty*, 57 Miss. 373, 386. And see *Birmingham v. Klein*, 89 Ala. 461; *Matter of Market St.*, 49 Cal. 546; *De Clercq v. Barber Asphalt Paving Co.*, 167 Ill. 215; *Huston v. Tribbetts*, 171 Ill. 547; *Louisville v. McNaughten* (Ky.), 44 S. W. Rep. 380; *Shreveport v. Prescott*, 51 La. An. 1895; *Newby v. Platte County*, 25 Mo. 258; *Kansas City v. Bacon*, 157 Mo. 450; *McGuire v. Brockman*, 58 Mo. App. 307; *Pettibone v. Smith*, 150 Pa. St. 118; *Senor v. Board of Com'rs*, 13 Wash. 48; *Dalrymple v. Milwaukee*, 53 Wis. 178.

² See *Rogers v. St. Paul*, 22 Minn. 494; *Lohrum v. Eyermann*, 5 Mo. App. 481.

³ *Kirby v. Shaw*, 19 Pa. St. 258; *Parkersburg v. Tavenner*, 42 W. Va.

486. “The theory upon which such assessments are sustained as a legitimate exercise of the taxing power is that the party assessed is locally and peculiarly benefited, over and above the ordinary benefit which, as one of the community, he receives in all public improvements to the precise extent of the assessment:” *State v. Newark*, 27 N. J. L. 190. “The sole ground for imposing a part or all of the cost of a public improvement upon one part of a municipality is that the part burdened with the cost receives corresponding benefits which the general public does not receive:” *Detroit v. Recorder's Court Judge*, 112 Mich. 588. “The principle upon which rests that numerous class of statutes which charge lots of ground with the expense of grading

Special authority requisite. Assessments being a peculiar species of taxation, there must be special authority of law for imposing them. The ordinary grant to a municipal corporation of power to levy taxes for municipal purposes will not

and paving the streets in front of them is, that the value of the lots is enhanced by the public expenditure:" *Strong, J.*, in *Schenley v. Commonwealth*, 36 Pa. St. 29, 57. The principle is that, "when certain persons are so placed as to have a common interest amongst themselves, but in common with the rest of the community, laws may be justly made providing that, under suitable and equitable regulations, those common interests shall be so managed that those who enjoy the benefits shall equally bear the burden:" *Shaw, Ch. J.*, in *Wright v. Boston*, 9 Cush. 233, 241—a drain case. "All these municipal taxes for improvement of streets rest for their final reason upon the enhancement of private properties:" *Woodward, J.*, in *McGonigle v. Allegheny City*, 44 Pa. St. 118, 121. And see, per *Coulter, J.*, in *Pray v. Northern Liberties*, 31 Pa. St. 69. The principle is "that the territory subjected thereto would be benefited by the work and charge in question:" *Grover, J.*, in *Litchfield v. Vernon*, 41 N. Y. 123, 133. "That principle of local taxation which is undisputed, which assesses on the property benefited, or its owner, a tax in proportion to the superadded value of the property caused by the local improvement, of which this property has a peculiar advantage beyond that of others not in like circumstances:" *Agnew, J.*, in the case of *Washington Avenue*, 69 Pa. St. 352, 360. See, also, *Lockwood v. St. Louis*, 24 Mo. 20; *Matter of Opening of Streets*, 20 La. An. 497; *In re Hun*, 144 N. Y. 472; *Allen v. Drew*, 44 Vt. 174, 187. "To pay for the opening of a street in the ratio to the

benefit or advantage derived from it is no burthen:" *Green, Ch. J.*, in *Paterson v. Society, etc.*, 24 N. J. L. 400, quoting with approval, *Matter of Mayor, etc.*, 11 Johns. 80. It is said by *Beck, J.*, in *Morrison v. Hershire*, 32 Iowa 271, 276, that "the power of the city to perform the work does not depend upon the benefits to be derived by property owners. The work is done for the benefit of the public; the assessment for its payment is levied upon the abutting lots, not because of any special benefit their owners derive from the improvement, but because the public good demands it, and the law authorizes special taxation for such objects." In contrast with this may be cited *Lodi Water Co. v. Costar*, 18 N. J. Eq. 519, cited with approval in *Matter of Drainage of Lands*, 35 N. J. L. 497, in which it was decided that where the cost of drainage is assessed upon lands without reference to the fact whether they are benefited to that extent or not, this constitutes an appropriation of private property to public uses. The same principle underlies the decisions in *Matter of Albany Street*, 11 Wend. 149, and *Louisville v. Rolling Mill Co.*, 3 Bush 416. And see *Van Tassel v. Jersey City*, 37 N. J. L. 128. In *Edwards, etc. Co. v. Jasper County (Iowa)*, 90 N. W. 1006, it is said that while authority to levy such assessments is traceable to the taxing power, they are nevertheless assessed on the theory that the property against which they are levied is benefited thereby to the extent of the levy, and the municipality acts as an agent, merely, in collecting the tax. In *Brunley v. Harris*, 107 Ga. 257, it

justify any other than the ordinary taxes. This would follow from the general rule which requires a strict construction of all such grants; but the principle has peculiar force when applied to powers in themselves exceptional.¹ And it is always

is said that assessments for the improvement of a street are sustained by the courts only because of benefits to the particular property, and that the executions issued therefor do not run generally against the other property of the owner, not situated on the street. "Special taxes for public improvements can only be assessed on the ground of special benefit to the property, and then only to the amount of the benefit:" *Boston v. Boston & A.R. Co.*, 170 Mass. 95. In Illinois, to assess without reference to actual benefits is held to be unconstitutional: *St. John v. East St. Louis*, 50 Ill. 92. And see *Lee v. Ruggles*, 62 Ill. 427; *Ill. Cent. R. Co. v. Bloomington*, 76 Ill. 447. In *Palmer v. Stumph*, 29 Ind. 329, an assessment is spoken of as being the adjustment of the shares of a contribution to be made by several towards a common object, according to the benefit received. Taxes, it is said, are impositions for purposes of general revenue; assessments are special and local impositions upon property in the immediate vicinity of an improvement, laid with reference to the special benefit which such property derives from the expenditure. In *Hale v. Kenosha*, 29 Wis. 599, an assessment, as distinguished from other kinds of taxation, is defined in similar language. And see *Bridgeport v. N. Y. & N. H. R. Co.*, 36 Conn. 255; *Alexander v. Baltimore*, 5 Gill 383. It is said in *Hagar v. Reclamation District*, 111 U. S. 701, that, in laying special assessments, "If no direct and invidious discrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection to the mode

pursued, that, to some extent, inequalities may arise."

¹See *Hitchcock v. Galveston*, 96 U. S. 341; *Augusta City Council v. Murphy*, 79 Ga. 101; *Wright v. Chicago*, 20 Ill. 253; *Davis v. Litchfield*, 145 Ill. 313; *First Presb. Church v. Fort Wayne*, 36 Ind. 338; *Niklaus v. Conkling*, 118 Ind. 289; *Adams v. Shelbyville*, 154 Ind. 467; *Indianapolis & U. R. Co. v. Capitol Paving, etc. Co.*, 24 Ind. App. 114; *Polk County Savings Bank v. State*, 69 Iowa 24; *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112 Iowa 300; *Simpson v. Kansas City*, 46 Kan. 438; *New Iberia v. Weeks*, 104 La. 489; *Appeal of Powers*, 29 Mich. 504; *Sharp v. Speir*, 4 Hill 76; *Stebbins v. Kay*, 123 N. Y. 31; *Nehasane Park Assoc. v. Lloyd*, 167 N. Y. 431; *McCrowell v. Bristol*, 89 Va. 652; *Vaughn v. Ashland*, 71 Wis. 502. A statute authorizing cities to deepen, widen, alter, or change the channel of water-courses does not empower them to levy special assessments for the purpose of deepening water-courses: *Chicago v. Law*, 144 Ill. 569. The decision of a city council that a proposed act constitutes a "local improvement" within the statute authorizing such improvement is not conclusive: *Chicago v. Blair*, 149 Ill. 310. A statute authorizing cities and villages to construct water-works, and to levy a general tax to pay therefor, by implication forbids them to pay therefor by special assessment: *Morgan Park v. Wiswall*, 155 Ill. 262. Under a statute authorizing cities to make local improvements by special assessment or special taxation or otherwise, "as they shall by ordinance prescribe," a city cannot levy a special tax to

held that such a power, when plainly granted, is to be construed with strictness,¹ and as strictly pursued by the authorities who are to levy the tax.²

2. Cases for assessments. No decision has ever undertaken to enumerate the cases in which special assessments are admissible. The reserve in this regard is wise, as it is obviously impossible to anticipate all the cases in which it might be equitable and proper to levy them; and it is consequently better and safer that special cases, as they present themselves, be

pay for an improvement which, without any ordinance authorizing it, has been made before the proceedings to levy the special tax were begun: *Carlyle v. Clinton County*, 140 Ill. 512. Where the boundary line of a city is uncertain, local improvements may be made with reference to any recognized city limits: *Bloomington Cemetery Assoc. v. People*, 139 Ill. 16.

¹*Shreveport v. Prescott*, 51 La. An. 1895; *Reed v. Toledo*, 18 Ohio 161; *Allentown v. Henry*, 73 Pa. St. 404; *Oshkosh City R. Co. v. Winnebago County*, 89 Wis. 435. A statute empowering cities and villages to construct and maintain drains and pumping works for drainage purposes by means of special assessments does not authorize a municipality to levy a special assessment to defray the cost of operation of such pumping works, since operation is different from maintenance: *McChesney v. Hyde Park*, 151 Ill. 634. Where the statute referring to street and alley improvements provides that the council may have the sidewalk graded and paved, or the whole width of the street graded and paved, the council cannot, besides ordering an existing brick sidewalk to be curbed and widened, have the space between the brick and the new curb filled with rich dirt and sodded, the cost to be assessed to the adjoining property-

owner: *Adams v. Shelbyville*, 154 Ind. 467. The test whether an improvement is local or not depends upon the question whether or not it benefits the property assessed: *Ewart v. Western Springs*, 180 Ill. 318.

²*Smith v. Davis*, 30 Cal. 536; *Taylor v. Downer*, 31 Cal. 480; *Hager v. Burlington*, 42 Iowa 661; *Starr v. Burlington*, 45 Iowa 87; *Becroft v. Council Bluffs*, 83 Iowa 646; *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112 Iowa 300; *Shreveport v. Prescott*, 51 La. An. 1895; *White v. Stevens*, 67 Mich. 33. Where the ordinance requires the special tax to be assessed according to the frontage, an assessment according to some other rule is fatally defective: *Ware v. Jerseyville*, 158 Ill. 234. Under a statute authorizing a town "by ordinance to levy and collect taxes" for street grading, a general ordinance providing that on petition the council shall order a street graded, "and shall also levy a special tax for the payment thereof," an order of the council opening a street does not constitute a levy: *Trenton v. Cole*, 107 Mo. 193. Where the statute provides for the completion of unauthorized street improvements, and assessment for their cost, on the basis of *quantum meruit*, an assessment based on the contract price, without even a finding that such price is fair, is erroneous: In re

judged upon their special circumstances.¹ The following public purposes have been held to justify special burdens in return for special benefits:

Court-house and other public buildings. The general rule would require that these be constructed by the political community that is to own and make use of them. It has, nevertheless, been held in several cases that a municipality may be permitted to contribute specially, in addition to its share in the general burden, in consideration of the benefits it may receive from having a state or county building located within it.² And while, in the adjudicated cases, the expense has generally, if not always, been divided between the state or county and municipality specially taxed, the principle would seem to admit of the whole burden being assumed by the locality peculiarly benefited, if the advantages to be reasonably anticipated were sufficient to warrant it.

It is proper to remark of these cases that they are referred to here only because of the principle that supports them, and not because, in other respects, they differ from the customary taxation. Such an exceptional burden is not laid in the form of a special assessment, but, on the contrary, the municipality which contributes specially to the erection of a public building

Morewood Avenue, 159 Pa. St. 20, 39. It is as competent to provide for laying an assessment for work already done in good faith as for one to be done in the future: *Ricketts v. Hyde Park*, 85 Ill. 110.

¹ "It is not the agency used, or its comparative durability, which must determine whether a work is an 'improvement.' . . . The only essential elements of a 'local improvement' are those which the term itself implies, viz., that it shall benefit the property on which the cost is assessed in a manner local in its nature, and not enjoyed by property generally:" *State v. Reis*, 38 Minn. 371. A city having power to make local improvements by special assessment and taxation has implied power to declare what are local improvements,

where such declaration is not made arbitrarily or unreasonably, or without reference to benefits: *Illinois Cent. R. Co. v. Decatur*, 154 Ill. 173. The decision of a city council that a viaduct extending over railroad tracks and a creek is a local improvement, to be paid for by special assessment, is, in the absence of fraud, final, where it appears that such viaduct could not properly be constructed over the tracks without making it also cross the creek: *Louisville & N. R. Co. v. East St. Louis*, 134 Ill. 656. The decision of a city council that a proposed act constitutes a "local improvement" within the statute authorizing such improvement is not, however, conclusive: *Chicago v. Blair*, 149 Ill. 310.

² See *ante*, pp. 240-242.

for the state or county will do so by voting and raising for the purpose a sum as part of the general taxes for the year. In principle it seems to be special, but in the method of levy and collection it takes its place with the ordinary taxes, and is mingled with them on the same roll.

Streets and highways. The custom of the country, adopted from England, is to have the ordinary highways, though made for and belonging to the state at large, made, improved, and kept in repair by the districts in or through which they are made, except where, for special reasons, the legislature shall otherwise direct. But as these districts are usually the towns—or, where there are no towns, the counties—the expense of the public highways is usually provided for by the general town or county levy, except in the case of important thoroughfares, which are sometimes constructed by the state at large, and except also where contributions in labor are demanded for the purpose.¹ As these contributions are usually based on a valuation of property, and, if not made, an equivalent in money is collected, the general result, when they are called for, is the same as it would have been had the expense been estimated and an assessment to meet it been made as a part of the general town or county charges. The owners of property on or near an ordinary country road cannot be made to bear the expense of improving it; for a rural highway is not a “local improvement,” and the benefit of improving it results to the general public.²

As to village or city streets a different practice has prevailed.

¹ See *Miller v. Gorman*, 38 Pa. St. 80 Minn. 325; *In re Washington Av.*, 69 Pa. St. 352. The mere legislative transfer of a road from county to city does not make the road a street so that abutters can be subjected to assessments that are legal only in the case of a city street: *Heiple v. East Portland*, 13 Or. 97. And the transfer by a turnpike company to a public-road board, of its franchise, confers no peculiar benefit on an adjacent land-owner for which an assessment can be made against him: *State v. Essex Public Road*, 47 N. J. L. 101, 48 N. J. L. 372.

² *Graham v. Conger*, 85 Ky. 582; *Conger v. Bergman* (Ky.), 11 S. W. Rep. 84; *Conger v. Graham* (Ky.), 11 S. W. Rep. 467; *Sperry v. Flygare*,

No doubt it is entirely competent to put them upon the footing of common highways, and require them to be constructed and kept in repair by a general levy on the city or village;¹ and such must be the course in the absence of any legislation permitting the municipal corporation to levy street taxes on some different basis.² But the opening or improvement of a city or village street almost invariably brings to the property in its immediate vicinity an enhancement of value, in which the people of the municipality at large can participate but slightly. It is not surprising that the parties who are to receive the benefit of this enhanced value are usually the ones who are active in pressing upon the public authorities the importance of these improvements; and while in this there is nothing censurable, and nothing that can justify their being singled out for invidious discrimination, yet their relation to the improvement, which induces this action, may very justly be considered when the burden comes to be imposed. That they should pay the cost, or at least some exceptional portion of the cost, in return for special benefits secured, is a belief that has found very general expression in the legislation on this subject.

Special assessments are therefore made for the cost of land required to be taken in opening streets,³ and, when this is done,

¹ See *People v. Whyler*, 41 Cal. 351, 354; *Sinton v. Ashbury*, 41 Cal. 525.

² *Sharp v. Speir*, 4 Hill 76.

³ *Matter of Twenty-sixth Street*, 12 Wend. 203; *Matter of De Graw Street*, 18 Wend. 568. In these cases a basis for an assessment under peculiar circumstances was laid down. *Bauman v. Ross*, 167 U. S. 548; *Nichols v. Bridgeport*, 23 Conn. 189; *Dorgan v. Boston*, 12 Allen 223; *Parrotte v. Omaha*, 61 Neb. 96, and many others, are cases of this description. The assessment of special benefits for the purpose of raising a fund to pay those who have been damaged by the opening, widening, or vacating, of streets is a species of taxation, and, therefore, within the power of the legislature: *In re Vacation of Centre Street*, 115 Pa. St. 247.

Only property abutting on part of a street opened can be assessed therefor: *In re Orkney Street*, 194 Pa. St. 425. Where part of a lot is condemned for a street, it is proper, in assessing the cost thereof, to assess benefits against the residue of said lot: *Waggeman v. North Peoria*, 155 Ill. 545. See *Genet v. Brooklyn*, 99 N. Y. 296. In *Sutton's Heirs v. Louisville*, 5 Dana 28, it was held not competent to open a street through the grounds of non-assenting parties, offset benefits against the value of land, and render judgment against the owners for the preponderance of benefits. The case, it will be seen, did not take the form of taxation, but of a judicial inquisition. For the general principle, see *Matter of Pittsburgh Dist.*, 2 W. & S. 320; *Mc-*

it is not uncommon to provide that one commission or jury shall estimate the value of the lands taken and the incidental damages, if any, and assess these, together with the costs of the proceeding, upon the lands peculiarly benefited.¹ They are

Masters v. Commonwealth, 3 Watts 292; *Pittsburgh v. Scott*, 1 Pa. St. 309; *Alexander v. Baltimore*, 5 Gill 383; *Powers' Appeal*, 29 Mich. 504. In the case last named the whole subject is fully and carefully considered by *Campbell, J.*, who points out that, in such cases, where in the same proceeding land is taken for the public use and the cost of the improvement assessed upon adjacent land, the principles which underlie the law of eminent domain must be carefully observed, as well as those which apply to taxation. Where the benefits to the land remaining are equal to the value of the land taken, the owner has no ground for claiming damages: *Trinity College v. Hartford*, 32 Conn. 452; and where they exceed the damages, he may be taxed for the excess: *Nichols v. Bridgeport*, 23 Conn. 189; *Holton v. Milwaukee*, 31 Wis. 27. As to the effect of a constitutional provision in Ohio which entitles the owners of land taken to full compensation without deduction of benefits, see *Cleveland v. Wick*, 18 Ohio St. 303. That provision must be regarded as a limitation upon the power of assessment; and, therefore, compensation paid to a land-owner for opening a street cannot be assessed back upon his remaining lands, nor can the costs and expenses incurred in such proceedings be so assessed: *Cincinnati, L. & N. R. Co. v. Cincinnati*, 62 Ohio St. 465. "It was decided in *McMasters v. Commonwealth*, 3 Watts 292, that in the opening of streets in a town or city, the damage occasioned to some of the lots might be apportioned and assessed upon others in the neighborhood improved in value thereby. It

is there assumed as a well settled principle, employing the words of Chancellor *Walworth* in *Livingston v. New York*, 8 Wend. 85, that when any particular county, district, or neighborhood is exclusively benefited by a public improvement, the inhabitants of that district may be taxed for the whole expense of the improvement, and in proportion to the benefit received by each. The conclusion seemed logically to follow; for if a county, district, or town can be assessed for a public improvement, on the ground that they are particularly benefited, there can be no constitutional reason to exempt an individual from assessment on the same principle. It becomes a mere question of expediency, of which the legislature are the competent and exclusive judges, and not of right." *Shurswood, J.*, in *Hammett v. Philadelphia*, 65 Pa. St. 146. It is not essential to the validity of assessments made for the cost of opening a new street that the ordinance should in all cases provide for the ordinary improvements to be made thereon: *Pearson v. Chicago*, 162 Ill. 383.

¹ See *Litchfield v. Vernon*, 41 N. Y. 123. Also, *Goodrich v. Turnpike Co.*, 26 Ind. 119; *Hammett v. Philadelphia*, 65 Pa. St. 146, and *Livingston v. New York*, 8 Wend. 25, there quoted; *In re Amsterdam Common Council*, 126 N. Y. 158; *Bauman v. Ross*, 167 U. S. 548. It has been held competent, where land-owners dedicate a street through their property, to order it graded and made fit for travel at their expense: *State v. Dean*, 23 N. J. L. 335; *Holmes v. Jersey City*, 12 N. J. Eq. 299.

also made for the costs of grading streets,¹ for paving, planking, or otherwise improving streets,² as well as for altering, widen-

¹ *Wray v. Pittsburgh*, 46 Pa. St. 365; *McNair v. Ostrander*, 1 Wash. St. 110. Meaning of the term "grading": *Adams v. Shelbyville*, 154 Ind. 467. The cost of grading preparatory to paving a street is properly charged as incidental thereto, and assessments against a street-railway company for paving its right of way may include the cost of grading also: *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109. It is competent to change the grade and assess the expense against adjoining owners: *La Fayette v. Fowler*, 34 Ind. 140. In Nebraska it has been held that the damages occasioned by a change in the grade of a street, and which have been paid by the city, cannot be levied by special assessment on abutting property: *Goodrich v. Omaha*, 10 Neb. 98. In Illinois it has been held that under the general authority to control and improve a street the city council may order it graded and a certain width in the center thereof sodded, and may levy an assessment therefor: *Murphy v. Peoria*, 119 Ill. 509. A special assessment to pay for grading, sodding, and planting with trees a park in the middle of a street, sustained: *Thomson v. Highland Park*, 187 Ill. 265.

² *Gozzler v. Georgetown*, 9 Wheat. 593; *Willard v. Presbury*, 14 Wall. 675; *Chambers v. Satterlee*, 40 Cal. 497; *People v. Austin*, 47 Cal. 353; *Enos v. Springfield*, 113 Ill. 65; *Indianapolis v. Mansur*, 115 Ind. 112; *La Fayette v. Fowler*, 34 Ind. 140; *Morrison v. Hershire*, 32 Iowa 271; *Williams v. Detroit*, 2 Mich. 560; *Macon v. Patty*, 57 Miss. 378; *People v. Brooklyn*, 4 N. Y. 419; *In re Dugro*, 50 N. Y. 513; *Cleveland v. Wick*, 18 Ohio St. 303; *Taylor v. Boyd*, 63 Tex. 533; *Adams v. Fisher*, 63 Tex. 651; *Connor v. Paris*, 87 Tex.

32; *Turnwater v. Pix*, 18 Wash. 153; *Parkersburg v. Tavenner*, 42 W. Va. 486; *State v. Christopher*, 12 Wis. 627. As to the meaning of the term "paving," see *Adams v. Shelbyville*, 154 Ind. 467. In a statute empowering a board of aldermen to tax abutting property for "grading, macadamizing, building, guttering, curbing, and repairing streets," the word "building" includes paving, and the city is not restricted to macadamizing its streets, but may pave them with asphalt: *Morse v. West-Port*, 110 Mo. 502. Charter authority to pave or improve sidewalks and gutters at the expense of abutting owners does not authorize a city to impose upon them the burden of paving the entire width of the street in front of their respective properties: *McCrowell v. Richmond*, 89 Va. 652. In Illinois, where streets and parts of streets embraced in proposed improvements are similarly situated, and are to be paved in the same way and with the same material, they may be considered as one single improvement, and be provided for by a single municipal ordinance: *Springfield v. Greene*, 120 Ill. 269. The authority to assess the expense of paving includes all that is necessary, usual, or fit in paving, including curbing: *Schenley v. Commonwealth*, 36 Pa. St. 29; *Burmeister's Petition*, 76 N. Y. 174. It includes the laying of a cross-walk: *Matter of Burke*, 62 N. Y. 224. Where the improvement consists in curbing and macadamizing a street, the municipality cannot be assessed for the benefit done to cross-streets at their intersections with the street sought to be improved: *Walters v. Lake*, 129 Ill. 23. No objection to confirmation of special tax for paving a street that the city has ex-

ing, and extending them.¹ The power to assess the expense of repaving or replanking a street on the adjacent proprietors, who were subjected to the expense of the first construction, has been denied by the supreme court of Pennsylvania;² but the

tended paving at each street intersection several feet beyond the side of the street in question, and that the grade of the street has been changed in order to pave it: *White v. Alton*, 149 Ill. 626. An assessment to defray the cost of improving a street at a grade other than the legal, held invalid: *McManus v. Hornaday*, 99 Iowa 507. Though the statute contemplates that street railway tracks shall be paved and macadamized by the railroad companies at their own expense, the city may pave the rest of the street at the cost of the abutting lot, whether the special improvement required of the railroad company has or has not been made: *Bacon v. Savannah*, 86 Ga. 301.

¹ *Jones v. Boston*, 104 Mass. 461; *Hancock Street Extension*, 18 Pa. St. 26.

² *Hammett v. Philadelphia*, 65 Pa. St. 146; *Harrisburg v. Segelbaum*, 151 Pa. St. 172; *Philadelphia v. Ehret*, 153 Pa. St. 1; *Philadelphia v. Hill*, 166 Pa. St. 211; *Scranton v. Sturgis* (Pa.), 51 Atl. Rep. 764. As to the municipal adoption of a turnpike as a paved street necessary to exempt from further paving such turnpike after it has been brought within the city's limits, see *Dick v. Philadelphia*, 197 Pa. St. 467. In *Hammett v. Philadelphia*, *supra*, at p. 155, *Sharswood, J.*, said: "The original paving of a street brings the property bounding upon it into the market as building lots. Before that, it is a road, not a street. It is therefore a local improvement, with benefits almost exclusively peculiar to the adjoining properties. Such a case is clearly within the principle of assessing the

cost on the lots lying upon it. Perhaps no fairer rule can be adopted than the proportion of feet front, although there must be some inequalities if the lots differ in situation and depth. Appraising their market values, and fixing the proportion according to these, is a plan open to favoritism or corruption, and other objections. No system of taxation which the wit of man ever devised has been found perfectly equal. But when a street is once opened and paved, thus assimilated with the rest of the city and made a part of it, all the particular benefits to the locality, derived from the improvements, have been received and enjoyed. Repairing streets is as much a part of the ordinary duties of the municipality, for the general good, as cleaning, watching, and lighting. It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments." The able dissenting opinion of *Read, J.*, contains an interesting review of Pennsylvania legislation on the subject of special assessments, as well as of the adjudications in that and other states. Paving the footway and curbing had been done by a property-owner on requirement of authorities; four years afterwards the roadway was narrowed and footway widened and owner required to put up new and costly curb. He refused. The street was then in good condition. *Held*, he could not be compelled: *Wistar v. Philadelphia*, 80 Pa. St. 505. It was held in *Bullitt v. Selvage* (Ky.), 47 S. W. Rep. 255, citing *Fehler v. Gosnell*, 99 Ky. 380, that a street assessment cannot be enforced to the

authorities in general sustain the right;¹ and it has been well remarked in Louisiana that: "if the first paving of a street is a special benefit to the front proprietor, justifying the imposition upon him of a portion of the expense, while the city pays for the residue as having been incurred for a matter of general utility, so the removal of a dilapidated or insufficient pavement, and the making of a new and sufficient one in its stead, is a matter of special benefit to the front proprietor, as well as of general utility. The equity is the same in both cases. . . . It seems to me that the power to pave the streets is a permanent continuing power, to be exercised when the public good

extent that it is for the expense of keeping streets in repair. And in *Portland v. Bituminous Paving, etc. Co.*, 33 Or. 307, an assessment against property to meet the additional expense of street repairs was held void because not warranted by the city charter. An assessment for paving a street is not invalid as one in part for repairs, where the contract's provision as to repairs is merely a guaranty that the improvement shall be executed as the contractor had agreed to make it: *Shank v. Smith*, 157 Ind. 401. Under a charter providing that street repairs shall be paid by the city and reconstruction by the property-owners, a taxpayer cannot object to an assessment for reconstruction, where it did not appear to be higher on account of a guaranty of the work than it would have been for perfect work without the guaranty: *Seaboard Nat. Bank v. Woeston*, 147 Mo. 467. Repair of a street, though extensive, and of a character presumably permanent, made at the city's expense and not at the expense of the abutting owners, is not an original paving, such as will prevent a future paving at the expense of abutters: *Philadelphia v. Dibeler*, 147 Pa. St. 261. As to what constitutes repaving, and not "ordinary repair," so as to authorize a special assessment against

the abutting realty, see *Robertson v. Omaha*, 55 Neb. 718. Also as to what constitutes repaving, see *Garvey's Petition*, 77 N. Y. 523. It includes reflagging: *Matter of Phillips*, 60 N. Y. 16. See, generally, as to repaving, *In re Astor*, 53 N. Y. 617; *Brady's Petition*, 85 N. Y. 268; *In re Smith*, 99 N. Y. 224.

¹ *Willard v. Presbury*, 14 Wall. 676; *Gurnee v. Chicago*, 40 Ill. 165; *Bradley v. McAtee*, 7 Bush 667; *Broadway Baptist Church v. McAtee*, 8 Bush 508; *Municipality v. Dunn*, 10 La. An. 57; *Williams v. Detroit*, 2 Mich. 560; *Sheeley v. Detroit*, 45 Mich. 425; *State v. District Court*, 80 Minn. 339; *McCormack v. Patchin*, 53 Me. 33; *Farrar v. St. Louis*, 80 Mo. 379; *Estes v. Owen*, 90 Mo. 113; *Agens v. Mayor, etc.*, 35 N. J. L. 168, 37 N. J. L. 415; *State v. Newark*, 49 N. J. L. 239; *Ladd v. Portland*, 32 Or. 271; *Adams v. Beloit*, 105 Wis. 363. It was held in *Crane v. West Chicago Park Com'rs*, 153 Ill. 348, that the maintenance and repair of a street already improved is not a local improvement. And in *McFarlane v. Chicago*, 185 Ill. 242, an ordinance requiring an assessment for newly paving with brick a street paved four years before with cedar blocks still in good condition was held void when there was nothing to show that brick was required in that particular locality.

may require it, and that the power to levy a contribution on the property benefited by the paving in front of it is equally durable and continuing.”¹ The cost of curbstones is usually provided for in the same method.² And it may be said that, in general, for any improvement whatsoever that tends to make the street more suitable and convenient for the use of the general public,³ an assessment may be laid.

What is said above will apply to highways by water as well as highways by land, in all cases to which like reasons are applicable.⁴ But the improvement of a navigable stream for the

¹ *Slidell*, Ch. J., in *Municipality v. Dunn*, 10 La. An. 57. Where the power exists to repave a street once paved at the expense of a city and adjoining land-owners, the question of necessity is with the council, and is not open to review or attack collaterally except for fraud: *Shimmons v. Saginaw*, 104 Mich. 511. The fact that a street railway company has agreed to keep a part of a street in repair is not available to an abutting owner as an objection to an assessment for repair: *People v. Brooklyn*, 65 N. Y. 349. Under a statute empowering a city council to order the building of sidewalks, to be paid for by a special tax on the abutting property, but conferring no power to order curbing for the roadway of the street, curbing cannot be ordered, the curb being no part of the sidewalk: *Job v. People*, 193 Ill. 609.

² An assessment for paving and curbing is not invalid on the ground that it requires grading which was not mentioned in the resolution, where the grading done was so small in amount that it might be assumed it was merely to remove small inequalities in the surface: *Williams v. Bisanago* (Cal.), 34 Pac. Rep. 640. An assessment for grading, curbing, and paving a street cannot be laid against property which, though abutting on the same street, does not abut on the

part improved: *In re Fifty-fourth Street*, 165 Pa. St. 8. Where a property owner has well and properly set curbstones in front of his property at his own expense, on proper time, in accordance with the style in common use, and they are in good order and repair, the expense of replacing them with others cannot be provided for by an assessment upon his property: *Wistar v. Philadelphia*, 111 Pa. St. 604.

³ The construction of a railroad passenger station and the improvement of certain streets leading thereto held to be a public improvement authorizing a special assessment based on benefits derived from the entire assessment: *Sears v. Board of Street Com'rs* (Mass.), 62 N. E. Rep. 397. A lot-owner cannot object to a special assessment for bridging a street that the city has power to make a railroad whose tracks are bridged build the bridge: *State v. Ensign*, 54 Minn. 372. The cost and damages of a wall erected in a street to give access to certain private property cannot be assessed against other private property abutting on the street: *In re Wick Street*, 184 Pa. St. 93.

⁴ *Johnson v. Milwaukee*, 40 Wis. 315. This was a case of special assessment for dredging a river.

benefit of commerce is not a local improvement, and a city cannot make it by special assessment.¹

Sidewalks. While sidewalks may be ordered constructed under the police power, as is shown on a preceding page,² they may also be constructed by means of special levies; and this is sometimes done, the expense being apportioned by frontage³ or by some standard of benefits. The rules applied in the case of levies for other street improvements are applicable to these, and the proceedings in assessing and collecting the levies for them do not require separate consideration.⁴

¹ *Chicago v. Law*, 144 Ill. 569. See, however, *Cook v. Port of Portland*, 20 Or. 580.

² *Ante*, pp. 1128-1130.

³ *Speer v. Athens*, 85 Ga. 49.

⁴ As to the legislative power to authorize a city to assess upon abutting land-owners the cost of a sidewalk in a street, see *Mauldin v. City Council*, 42 S. C. 293, 53 S. C. 516. Under authority to improve streets a municipality may improve sidewalks: *Taber v. Gafmiller*, 109 Ind. 206. But power to macadamize a street would not include the sidewalk: *Himmelman v. Satterlee*, 50 Cal. 68; *Dyer v. Chase*, 52 Cal. 440. An assessment levied for the construction of a sidewalk is an assessment for the improvement of the street within the meaning of a statutory provision that territory assessed for such improvement shall for five years be exempt from assessment for the improvement of another street: *Pretz-wiger v. Sunderland*, 63 Ohio St. 132. The grant of a power to "regulate and improve" sidewalks has been held not to authorize an assessment for building them: *Fairfield v. Rat-cliff*, 20 Iowa 396. The special assessment for a sidewalk is not necessarily limited to the benefits: *White v. People*, 94 Ill. 604. See *State v. Fuller*, 34 N. J. L. 224. In New Jersey the whole cost of sidewalks may be

assessed upon abutting property irrespective of benefits: *Van Tassel v. Mayor*, 37 N. J. L. 128. The cost of gutters may be so assessed: *Robins v. Commissioners*, 44 N. J. L. 116. The only authority for making assessments for sidewalks and street paving being in a charter that permits assessments against abutting property for not more than one-fourth of the cost, and not in excess of the benefits, an assessment under an ordinance which provides for apportioning against the lots a certain part of the cost, without reference to benefits, is void: *Montgomery v. Foster* (Ala.), 32 South. Rep. 610. Ordinances for constructing a sidewalk on a street for a number of blocks sustained, although specifying that the walk might, for one block, be built by special assessment, while the rest was to be done by special taxation; there being no commingling of systems as to any of the walk: *Ronan v. People*, 193 Ill. 631. An ordinance for the construction, by special assessment, of a cement sidewalk twenty feet wide on each side of a street one hundred feet wide, held not unreasonable: *Chicago v. Wilson*, 195 Ill. 19. In Pennsylvania, where a good sidewalk is torn up and destroyed by the city in changing the street grade, the lot-owner cannot be taxed with a new one: *Philadelphia*

Parks. City and town parks are sometimes purchased, improved, and embellished under special legislative authority by means of general levies on the municipalities that are to own and have the benefit of them.¹ But sometimes special taxing districts composed of several municipalities, or of parts of several, are created for the purpose, and a corporation is chartered with power to lay and collect taxes. But for the purposes of a city park there cannot be created outside the city a district upon which the cost of the park shall be imposed, though it is situated within such district.² Where by the constitution only municipal bodies are authorized to levy taxes, if a park district is created embracing several towns, all of which accept the act creating it, the towns may afterwards be required to levy taxes in accordance with the act, to be expended within the limits of the town levying them.³ And the towns having once accepted the act, it may afterwards be amended without their assent.⁴ It is competent to apportion park taxes by special benefits.⁵

Drains, sewers, etc. The expense of constructing drains in order to relieve swamps, marshes, and other low lands of their stagnant water is usually provided for by special assessments. The grounds on which this is done are not always very clearly shown in the statutes. Sometimes the ground indicated is that the drainage is important to the public health; and in such cases the right to levy assessments for the purpose cannot plau-

v. Henry, 161 Pa. St. 38. As to the ownership of the materials in a sidewalk, see *Rogers v. Randall*, 29 Mich. 41; *Leonard v. Cincinnati*, 26 Ohio St. 447.

¹ See *People v. Salomon*, 51 Ill. 37; *Matter of Central Park*, 50 N. Y. 493; *Matter of Flatbush Lands*, 60 N. Y. 398.

² *State v. Leffingwell*, 54 Mo. 458.

³ See *People v. Breslin*, 80 Ill. 423; *Halsey v. People*, 84 Ill. 89; *Wright v. People*, 87 Ill. 582.

⁴ *People v. Breslin*, 80 Ill. 423; *Dunham v. People*, 96 Ill. 331.

⁵ *Wilson v. Lambert*, 168 U. S. 611; *People v. Breslin*, 80 Ill. 423; *Dun-*

ham v. People, 96 Ill. 331; *Bass v. South Park Com'rs*, 171 Ill. 370; *Foster v. Park Com'rs*, 133 Mass. 321; *Briggs v. Whitney*, 159 Mass. 383; *State v. District Court*, 75 Minn. 292; *Kansas City v. Bacon*, 147 Mo. 259. An assessment for betterments from laying out a park is not defeated by the mere incidental sanitary benefit derived from the construction of the park: *Briggs v. Whitney*, *supra*. An avenue constructed as part of a park system may be a local improvement so that abutting property may be subject to an assessment: *In re Beechwood Av.*, 194 Pa. St. 86.

sibly be disputed.¹ The special benefits from the enhancement of values must accrue mainly to the owners of the lands drained, who ought, therefore, to bear the expense. But the authority to levy assessments for draining lands, upon no other considerations than such as pertain to the improvement of the land as property, must, it would seem, be confined within limited bounds. It has been said that "a tax cannot be levied upon any portion of the public for the construction of a drain in which the public is not concerned. Even the owner of the land benefited cannot be taxed to improve it, unless public considerations are involved; but he must be left to improve it or not, as he may choose."² But where any considerable tract of land, owned by different persons, is in a condition precluding

¹ In *Reeves v. Wood County Treas.*, 8 Ohio St. 333, the subject is considered by *Brinkerhoff, J.*, and the right to levy an assessment affirmed, though it does not distinctly appear that sanitary objects were had in view. In *Woodruff v. Fisher*, 17 Barb. 224, an assessment made ostensibly for the public health was maintained with some hesitation. Other cases are *Hagar v. Yolo Supervisors*, 47 Cal. 222; *Anderson v. Kerns Draining Co.*, 14 Ind. 199; *O'Reiley v. Kankakee Valley Draining Co.*, 32 Ind. 169; *Weaver v. Templin*, 113 Ind. 298; *Dunkle v. Herron*, 115 Ind. 470; *Draining Co. Case*, 11 La. An. 328; *Sherwood v. District Court*, 40 Minn. 22; *Lien v. Board of Com'rs*, 80 Minn. 58; *Sessions v. Crunklinton*, 20 Ohio St. 349. The benefit arising from the use of a drain for the removal of surface water is assessable: *Beals v. James*, 173 Mass. 591. In Illinois constitutional and statutory provisions limiting the formation of drainage districts to "agricultural or sanitary purposes" were held not to require that the benefits should be for agricultural or sanitary purposes: *Highway Com'rs v. Drainage Dist. Com'rs*, 127 Ill. 581.

² *People v. Saginaw Supervisors*, 26 Mich. 22, 29. That the taking of

lands for drains is a taking under the power of eminent domain, see this case; also, *People v. Nearing*, 27 N. Y. 306. A statute authorizing the assessment of the expense of ditches jointly on the petitioners and owners of lands benefited was held void as constituting a taxation of property for private purposes: *In re Tuthill*, 163 N. Y. 133. If, however, a man's premises are a nuisance by reason of their gathering and retaining water until it becomes stagnant and breeds miasma, he may be required to abate the nuisance at his own cost, and on his failure to do so, the cost may be assessed against him. It has been decided that a special assessment against plaintiff to pay cost of filling up his lot which was a nuisance will not be restrained on allegations that the city caused the nuisance by raising the grade of the street, it not being alleged that the lot was not benefited by the filling, and the plaintiff presumptively having been compensated for any damage from the grade: *Watkins v. Milwaukee*, 55 Wis. 335, citing *Smith v. Milwaukee*, 18 Wis. 63. In *Blue v. Wentz*, 54 Ohio St. 247, it was held that lands naturally drained are not liable for the expense of a ditch necessary for the drainage of other lands.

cultivation, by reason of excessive moisture which drains would relieve, it may well be said that the public have such an interest in the improvement, and the consequent advancement of the general interest of the locality, as will justify the levy of assessments upon the owners for drainage purposes. Such a case would seem to stand upon the same solid ground with assessments for levee purposes, which have for their object to protect lands from falling into a like condition of uselessness.¹ But

¹See *Head v. Amoskeag Manuf. Co.*, 113 U. S. 9; *Wurts v. Hoagland*, 114 U. S. 606; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112. In the case last named it is said: "Statutes authorizing drainage of swamp lands have frequently been upheld independently of any effect upon the public health as reasonable regulations for the general advantage of those who are treated for the purpose as owners of a common property." The power to levy assessments for the mere purpose of improving large bodies of lands is assumed by Chancellor *Walworth*, in *French v. Kirkland*, 1 Paige 117, and in *Philips v. Wickham*, 1 Paige 590. The statutes in question seem to have conferred upon the proprietors of lands quasi-corporate powers for the purpose. And see *Draining Co. Case*, 11 La. An. 338. The statute, which came under consideration in *People v. Nearing*, 27 N. Y. 306, appears to have had no reference to the public health. The Massachusetts statute of 1847, for the construction of drains in towns, is considered in *Wright v. Boston*, 9 Cush. 233. It is said by *Shaw*, Ch. J., that while the public have some interest in the draining, on the grounds of health and general convenience, it is not mainly with these views that the statutes are framed, but with reference to the benefits to estates taxed. And see *Springfield v. Gay*, 12 Allen 612; *Brewer v. Springfield*, 97 Mass. 152. The Pennsylvania statute of 1804, for draining a specified swamp, was held constitutional: *Rutherford v. Maynes*, 97 Pa. St. 78. In *Hagar v. Yolo Supervisors*, 47 Cal. 222, 233, *Crockett*, Ch. J., says: "It is said, however, that it is not within the constitutional power of the legislature to compel the petitioner to reclaim his lands at his own expense and against his consent. But we think the power of the legislature to compel local improvements, which, in its judgment, will promote the health of the people, and advance the public good, is unquestionable. In the exercise of this power it may abate nuisances, construct and repair highways, open canals for irrigating arid districts, and perform many othersimilaracts for the public good, and all at the expense of those who are to be chiefly and more immediately benefited by the improvement." "But we need not rest our decision on the narrow ground that this is strictly a local improvement. On the contrary, the reclamation of the vast bodies of swamp and overflowed land in this state may justly be regarded as a public improvement of great magnitude, and of the utmost importance to the community. If left wholly to individual enterprise it would probably never be accomplished; and in inaugurating so great a work the legislature has pursued substantially the same system adopted in other states for the reclamation of similar lands, to wit: by dividing the territory to be re-

under the rule of strict construction of powers to tax, authority to drain lands for the public health, and to lay assessments therefor, will not support an assessment the main cost of which is for filling in lands.¹

"The suitable maintenance of a public drain is, in most cases, quite as necessary as its original construction. The power to assess for this purpose continues so long as the drain exists and is of public utility, and may be exercised from time to time, upon the lands and their owners according to the benefits received."²

As regards sewers and culverts in cities and villages,³ it is

claimed into districts, and assessing the cost of the improvement on the lands to be benefited. This plan has been adopted in the states of Louisiana, Mississippi, and Arkansas, to prevent the annual overflow of the Mississippi by means of levees or embankments, constructed at the expense of the adjacent property. The 'Black Swamp' in Ohio has been wholly or partially reclaimed by the same method. A large body of land in Missouri is protected from inundation by similar means. In Massachusetts and Connecticut swamps and low lands are drained by means of assessments on the property benefited: and in New Jersey the salt marshes have been reclaimed in the same way. In this state, the city of Sacramento, including the ground on which the capitol stands, has been protected from inundation by means of levees, erected at the expense of the inhabitants, in the shape of a tax on the property within the district benefited. In none of these states, so far as we are aware, has the power of the legislature to cause such improvements to be made in this method ever been denied; nor do we see any tenable ground on which it can be questioned:" See Reclamation District v. Hagar, 6 Sawy. 567; Hagar v. Reclamation District, 111

U. S. 701; Fallbrook v. Irrig. Dist., 164 U. S. 112.

¹Van Buren's Petition, 79 N. Y. 384.

²Roudebush v. Mitchell, 154 Ind. 616. Lands that were not assessed for the construction of a drain may be assessed for maintaining it if through natural or artificial changes in their condition since it was constructed they would derive benefit therefrom: Ibid.

³In England, the sewer assessments are laid with reference to benefits, but they are not necessarily based on sanitary considerations: See Rooke's Case, 5 Rep. 99, b; Keighley's Case, 10 Rep. 139, a; Case of Isle of Ely, 10 Rep. 142, b; Dore v. Gray, 2 T. R. 358; Masters v. Scroggs, 3 M. & S. 447; Netherton v. Ward, 3 B. & Ald. 21; Stafford v. Hamston, 2 B. & B. 691; Rex v. Tower Hamlets, 9 B. & C. 517; Soady v. Wilson, 3 Ad. & E. 247; St. Catharine Dock Co. v. Higgs, 10 Q. B. 641; Metropolitan Board of Works v. Vauxhall Bridge Co., 7 El. & Bl. 964; Hammersmith Bridge Co. v. Overseers of Hammersmith, L. R. 6 Q. B. 230. A sewer rate cannot there be laid upon a whole town, but must be against particular estates: Emmerson v. Saltmarshe, 7 Ad. & El. 266. A statute authorizing the construction of drains has been construed as includ-

to be remarked that while they are often provided for by special assessments, there is no uniformity of practice in this regard, and perhaps, considering the different offices which sewers perform, being sometimes matters of imperative public necessity, and at others conveniences for a few tenements only, there ought to be the diversity that now prevails. That the cost may be assessed upon the adjacent premises under proper legislation has been often held.¹ And in Connecticut

ing sewers: *Hyde Park v. Spencer*, 118 Ill. 446; *Pearce v. Hyde Park*, 126 Ill. 289; *Rich v. Chicago*, 152 Ill. 20; *Charleston v. Johnston*, 170 Ill. 336.

¹*Pueblo v. Robinson*, 12 Colo. 593; *Cone v. Hartford*, 28 Conn. 363; *Murphy v. Wilmington*, 6 Houst. 108; *Payne v. South Springfield*, 161 Ill. 285; *Wright v. Boston*, 9 Cush. 233; *St. Louis v. Peters*, 36 Mo. 456; *People v. Brooklyn*, 23 Barb. 166; *Philadelphia v. Tryon*, 35 Pa. St. 401; *Lipps v. Philadelphia*, 38 Pa. St. 503; *Commonwealth v. Woods*, 44 Pa. St. 113; *Strand v. Philadelphia*, 61 Pa. St. 255; *Mauch Chunk v. Shortz*, 61 Pa. St. 399; *Wolf v. Philadelphia*, 105 Pa. St. 25; *Parkersburg v. Tavenner*, 42 W. Va. 486. The owner of land assessed for a sewer cannot object on the ground that another system of sewerage would have been better, and should have been adopted: *In re Long*, 58 Hun 609. Where village authorities have decided that the lands in the village shall be drained by means of a central reservoir, into which the sewage shall be carried by drains, and from which it shall be raised by pumps, the fact that some of the lands in the village could have been drained by the gravity system does not exempt such lands from assessment for the proposed pumping works: *McChesney v. Hyde Park*, 151 Ill. 634. That a board's power to order and construct a sewer was unwisely exercised, and that the sewer when completed could not be used, does not affect the valid-

ity of the proceedings, or relieve a property-owner of liability to pay a tax therefor: *Harney v. Benson*, 113 Cal. 314. Under a statute giving towns the right to adopt a system of sewerage and to provide that assessments shall be made on owners of estates within such territory by a fixed uniform rate, based upon the estimated cost of all the sewers therein, according to the frontage of any street or way where a sewer is constructed, assessments are not limited to persons who enter drains into the sewer, or who, by more remote means, receive benefit thereby: *Leominster v. Conant*, 139 Mass. 384. A statute authorizing lands peculiarly benefited by the construction of "lateral" sewers to be assessed not only for their cost, but also for part of the main sewer into which they empty, is valid: *DeWitt v. Elizabeth*, 56 N. J. L. 119. An assessment for the construction of a sewer in streets along which water-mains have not yet been laid is not invalid on that account, since, even without such mains, the sewer would be of some benefit to the property: *Walker v. Aurora*, 140 Ill. 402. Lots near a proposed sewer which may eventually be made to drain into such sewer may be specially assessed to pay therefor, though they do not abut on the street in which the sewer is located: *Rich v. Chicago*, 152 Ill. 18. An assessment for a sewer along one side of an owner's property cannot be resisted on the

it has been decided that this may be done under a general power to make and maintain highways and streets by special assessments: the sewers which carry off the surface water from the streets, and the filth that would otherwise accumulate, being regarded rather as improvements of the public highway than as independent works.¹

ground that along his property are two other sewers sufficient for all purposes, and that this third sewer does not benefit his property, but is simply a part of the general sewer system: *Michener v. Philadelphia*, 118 Pa. St. 535. That part of a sewer ran through private property, the owners of which had not consented thereto, did not relieve property owners from paying for that part of the sewer that ran through the public streets: *Johnson v. Duer*, 115 Mo. 366. The validity of an assessment for a sewer is not affected by the fact that the sewer's outlet was on private property when the assessment was made: *Raymond Co. v. Maywood*, 140 Ill. 216. Nor is a special assessment for a sewer invalidated by the fact that at the time it was made there was no outlet to the sewer, the proposed outlet being at a point where a sewer is to be constructed: *Ryder's Estate v. Alton*, 175 Ill. 94. See *Bickerdicke v. Chicago*, 185 Ill. 280. A board of aldermen was held to have charter power to order a single structure to serve both as a conduit for a stream and for a sewer, and to assess upon those benefited thereby their proportional part of the expenditure necessary for the structure as a sewer: *Gray v. Board of Aldermen*, 139 Mass. 328. It is no objection to an assessment for constructing a sewer that the amount thereof is based on an estimate of the cost of the sewer system: *English v. Wilmington*, 2 Marvel 63. That notwithstanding the whole cost is on adjoining property, the sewer

may be made more capacious than present needs require, as a provision for future extensions, see *Hungerford v. Hartford*, 39 Conn. 279, 285. But a municipality cannot add to the amount of a sewer assessment part of the cost of a connecting sewer previously built for which no assessment was laid at the time: *Brown v. Fitchburg*, 128 Mass. 282. As to what constitutes a "new" sewer within a charter provision that the entire cost of "new" sewers shall be assessed on the property benefited, see *Denise v. Fairport*, 11 Misc. Rep. 199, 32 N. Y. Supp. 97. Finality of decision of city council requiring construction of sewer to replace old one, see *Allen v. Woods (Ky.)*, 45 S. W. Rep. 106. Extension of sewer not to be classified as repairs: *Cleveland v. Yonkers*, 51 Hun 644, 4 N. Y. Supp. 84. For rules for making the assessment, see *Pueblo v. Robinson*, 12 Colo. 593; *Clapp v. Hartford*, 39 Conn. 279, 285.

¹*Cone v. Hartford*, 28 Conn. 363. But it is held in Illinois that the statutory authority of a board to levy and collect special assessments for the improvement of streets does not include power to make assessments for sewers or water-mains for the benefit of adjoining property and not for the street itself: *West Chicago Park Com'rs v. Dunne*, 162 Ill. 87. And in *Clay v. Grand Rapids*, 60 Mich. 451, it was held that a city cannot assess under the name of street improvements for what is really the building of a sewer.

In the case of sewers it is very common to provide that the cost shall in part be a general levy on the municipality, and in part be collected by special assessment. Perhaps more often than in the case of any other local improvement it is just that such a division of the burden should be made. The lands on the line of a sewer do not usually receive all the special benefits and therefore should not pay all the cost; and when the district is extended to embrace other lands, there is imminent danger of doing injustice by extending it too far. In a clear case of the assessment of special benefits for a sewer upon lands which could not possibly receive special advantages therefrom, the courts have felt bound in some cases to interfere and annul the levy.¹ But a case of the kind ought to be so plain as to admit of no doubt.

¹It was held in *Sears v. Street Com'rs*, 173 Mass. 350, that the cost of the general construction of the sewers for an entire city, and of their management, is a proper subject for general taxation, rather than special assessment. In *Russell's Appeal* (Pa.), 23 Atl. Rep. 1102, it was decided that the cost of reconstructing a sewer which had become part of the general system for convenience and health, should be assessed, not upon abutting property, but by general taxation. A strip of land lying between a sewer and the next proprietor's land, not available for any use, is not assessable for the building of the sewer: *Atlanta v. Gabbett*, 93 Ga. 266. Lands that have paid assessments for the construction of sewers into which the lands drain do not receive an additional special and peculiar benefit from the general oversight and operation of the sewers of the entire city, such as to subject such lands to a second special assessment: *Sears v. Street Com'rs*, 173 Mass. 350. Benefits to pay for the cost of a main sewer cannot be assessed against the non-abutting owners whose property naturally drains into the sewer,

and who may at some future time connect therewith, but whose only present benefit is that enjoyed in common with the public, resulting from the confinement of noxious odors: *Beechwood Av. Cases*, 179 Pa. St. 490, following *Parker's Appeal*, 169 Pa. St. 433. A statute held void so far as aiming to require a present ascertainment of the special benefit which at an unknown period in the future, when a connecting branch sewer shall be laid, will accrue to property from a main sewer now built: *Vreeland v. Bayonne*, 58 N. J. L. 126. An assessment of land a third of a mile distant, which the sewer would not drain or benefit, cannot be sustained upon the remote probability that the city may in the future project a sewer to connect with this and thus benefit the land in question: *State v. Elizabeth*, 37 N. J. L. 330, citing *State v. Newark*, 36 N. J. L. 188. Farming lands drained by surface drainage only cannot be assessed specially for the construction of an underground city sewer, three miles away, where the ordinance for the construction of the sewer makes no provision for the connection of the surface drains

It has been held that property may be assessed for the construction of a sewer without reference to the cost of a private sewer previously built.¹ Under proper legislation a town or village may provide for extending sewers beyond its territorial limits.² In Pennsylvania it is considered that, after a sewer has once been built, the benefits from repairing or reconstructing it are only such as the abutting owners enjoy in common with the public; and such owners cannot, therefore, be charged with the cost of repair or reconstruction, whether the sewer was laid originally at their expense or at the expense of the municipality.³ But elsewhere it is held that an assessment to maintain and repair sewers is not invalid, even though they were in the first instance paid for by general taxation.⁴

with the sewer: *Edwards v. Chicago*, 140 Ill. 440. An ordinance is invalid which declares a tract a drainage district and assesses upon all the included property the cost of a sewer laid in the street in the center thereof, without furnishing any better drainage than before: *Bickerdike v. Chicago*, 185 Ill. 280. Private property cannot be assessed for an improvement unless actually benefited thereby, and then only to the extent of such actual benefit; and it cannot be assessed for a sewer in another drainage district: *Chicago v. Adcock*, 168 Ill. 221. But one is not relieved from an assessment for a sewer by the fact that other sewers were connected therewith, in the absence of a showing that such connection rendered it less beneficial to him: *Heinroth v. Kochersperger*, 173 Ill. 205. And confirmation of a special assessment for a sewer cannot be resisted on the ground that such sewer is distant from the land assessed more than three-fourths of a mile, since the sewer's distance from the land is merely an item to be considered in estimating the benefits: *Kelly v. Chicago*, 148 Ill. 90. Nor is the fact that part of the land in a sewer district cannot be drained by the sewer an objection to the

validity of the assessment therefor, where the only parties objecting are those whose lands are drained by the sewer: *Johnson v. Duer*, 115 Mo. 366. In providing for a sewer a city cannot dictate to an owner how he shall divide his land, and property that has not been subdivided cannot be assessed in the character of lots. Where land was used mainly for agricultural purposes, and was practically vacant, a requirement of "house-slants" on both sides of a sewer for every twenty feet, and of street openings every 330 feet, was held unreasonable and oppressive: *Bickerdike v. Chicago*, 185 Ill. 280. But see this latter case distinguished in *Vandersyde v. People*, 195 Ill. 200; *Chicago v. Corcoran*, 196 Ill. 146.

¹ *Atchison v. Price*, 45 Kan. 296; *St. Joseph v. Owen*, 110 Mo. 445. As to when a private sewer will not operate to relieve from assessment for a public one, see *Sargent v. New Haven*, 62 Conn. 510. See, also, *Newell v. Cincinnati*, 45 Ohio St. 407.

² *Shreve v. Cicero*, 129 Ill. 226; *Maywood Co. v. Maywood*, 140 Ill. 216.

³ *Erie v. Russell*, 148 Pa. St. 384; *Williamsport's Appeal*, 187 Pa. St. 565.

⁴ *Hunter's Appeal*, 71 Conn. 189

Levees. The construction of embankments to protect low lands, bordering upon rivers, from overflow, is a public object of the highest importance to the communities immediately concerned. No doubt general taxation is admissible for this purpose,¹ but the legislation which authorizes special assessments for the construction of embankments, and imposes the cost upon those who, without them, would be the principal sufferers, is probably in most cases wiser and better than would be any provision for general levies. The practice of making local assessments for this purpose has prevailed for many years in the states bordering on the lower Mississippi, and has been sustained against all the objections which have been made to such assessments for other purposes.² Special authority is, however, requisite for the purpose; a power to drain would not include the power to construct a levee as an independent work.³

¹ Indeed, it has been resorted to indirectly by the general government; heavy appropriations, the money for which comes from taxation, being made to deepen the channel of the Mississippi, and keep its flow within bounds.

² *State v. Maginnis*, 26 La. An. 558; *State v. Clinton*, 26 La. An. 561; *Excelsior Planting, etc. Co. v. Green*, 39 La. An. 455; *Munson v. Board of Com'rs*, 43 La. An. 33; *Williams v. Cammack*, 27 Miss. 209; *Alcorn v. Hamer*, 38 Miss. 652; *Daily v. Swope*, 47 Miss. 367; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495. See *Levee Dist. v. Huber*, 57 Cal. 41. In *People v. Whyler*, 41 Cal. 351, a levy for such a purpose made upon part of a county on the same basis as the ordinary taxes was held to be a tax, not an assessment. But the basis of apportionment should not be very conclusive on this point. It is one peculiarity of assessments that the measure of supposed benefits may be whatever appears to the legislature most just under the circumstances. See *Lockwood v. St. Louis*, 24 Mo. 20, where a levy made in the

same way was sustained as being an assessment, and not in the ordinary sense a tax. In *Chambliss v. Johnson*, 77 Iowa 611, it was held that land not itself overflowed, but which is so situated as to be benefited indirectly by the construction of a levee to prevent an overflow, may be assessed with the cost of the improvement. See *Minor v. Daspit*, 43 La. An. 337. The fact that a levee is constructed on a navigable stream so as to leave some lands between the levee and the stream does not exclude those lands from the levee district, so as to exempt them from the levee tax: *George v. Young*, 45 La. An. 1232. The special assessment of the oysters in oyster beds for taxes to maintain a levee system in a certain district was sustained on the ground that as oysters would be killed by the fresh water in the case of crevasses, they would, therefore, be benefited by the levees: *Board of Com'rs v. Mialeghvich*, 52 La. An. 1292.

³ *Updike v. Wright*, 81 Ill. 49. For a case of special assessment for a breakwater in a city, see *Teegarden v. Racine*, 56 Wis. 545.

Water pipes in streets. Of these it has been said that "the benefits are local, as the use of the water must necessarily be mostly restricted to the benefit of the property on [the] lines, both for domestic purposes and the extinguishment of fires. The effect of supplying streets with water is to enhance the value of the dwelling-houses thereon. The maintenance of the pipes and the supplying of water are necessarily a continuing expense," and for these reasons the assessment of the cost upon adjacent property is within the general principle of local assessments.¹

¹ *Allentown v. Henry*, 73 Pa. St. 404, 406, per *Mercur*, J. And see *Northern Liberties v. Swain*, 13 Pa. St. 113; *Northern Liberties v. St. John's Church*, 13 Pa. St. 104; *Philadelphia v. Union Burial Ground Soc.*, 178 Pa. St. 533. In *Allen v. Drew*, 44 Vt. 174, 187, *Redfield*, J., explains the principle of such assessments, and says: "It is not easy to see any distinction between an assessment for building a sewer or sidewalk, and an aqueduct. They are each in degree a general benefit to the public, and a special benefit to the local property, both in the uses, and in the enhanced value of the property. The proprietor may, indeed, leave his house tenantless, and his vacant lots unvisited, but the assessment is not for that reason void. Such assessments are justified on the ground that the subject of the tax receives an equivalent." The stand-pipe, pumping works, and buildings of a water-works system in a municipality are not local improvements, and must be paid for by general taxation; whereas the pipes which convey the water along particular streets are local improvements which may be paid for by special assessment: *Morgan Park v. Wiswall*, 155 Ill. 262; *Hughes v. Momence*, 163 Ill. 535, 164 Ill. 16; *O'Neil v. People*, 166 Ill. 561; *Hewes v. Glos*, 170 Ill. 436; *Harts v. People*, 171 Ill.

458; *Ewart v. Western Springs*, 180 Ill. 318. In *Crane v. Siloam Springs*, 67 Ark. 30, it was held that a provision of the constitution which authorized "assessments on real property for local improvements in towns and cities" did not by inference forbid assessments for improvements affecting the whole city, and that it was competent to lay off the city's entire area into an assessment district for constructing and maintaining a general system of water-works for the city. An ordinance authorizing the construction of water-works by general taxation, and a laying of water-mains by special assessment, held not invalid as providing for two improvements: *Hughes v. Momence*, 163 Ill. 535. An ordinance providing for laying water-mains in certain streets is not invalid merely because a private water-company has already laid mains in the street: *Ibid.* Water and sewer pipes connecting all the buildings in a street with the main pipes constitute a local improvement for which a special tax may be levied, even though the water-mains with which the connections are made belong to a private corporation: *Palmer v. Danville*, 154 Ill. 156. To the same effect, *Gleason v. Waukesha County*, 103 Wis. 225. After the power to lay water-mains and service-pipes had been exercised, a

Lighting streets. While lighting the streets is usually provided for by general tax, no reason is perceived why it may not be done by special assessments. Legislation for special assessments exists in several of the states.¹

Sweeping and sprinkling streets. Although the cases which uphold special assessments generally relate to improvements of a permanent character, yet provisions for charging upon abutting owners the expense of watering and sweeping streets have been sustained;² but there are decisions to the contrary.³

new and independent scheme of improvement by supplying service-pipes to each lot was held to be an abuse of power, especially as the burden thereof was disproportionately distributed: *Warren v. Chicago*, 118 Ill. 329. In the absence of statutory provisions on the subject, city authorities decide in what streets water-mains and lateral service-pipes are to be laid, so as to bring the water within the reach of consumers; and that certain lots assessed for such benefits are vacant and not in use, does not, of itself, show such an abuse of discretion as warrants judicial interference: *Ibid.* But merely because most of the lots benefited by the improvement have a frontage of only twenty-five feet each, the authorities are not justified in dividing a vacant lot having a front of forty-five feet, so as to make each half pay for a double service: *Ibid.* A special assessment by a city to pay for water-mains cannot be resisted on the ground that previously the city has paid for such mains out of the water-tax fund: *McChesney v. Chicago*, 152 Ill. 543. Where the statute gives a city council power to compel by ordinance the making of proper connections between water-mains in the street and abutting property, the council has no authority to levy an assessment on the abutting property for

the cost of such connections: *Alvord v. Syracuse*, 163 N. Y. 158.

¹ *Ewart v. Western Springs*, 180 Ill. 318. See *Jonas v. Cincinnati*, 18 Ohio 318; *Creighton v. Ohio St.* 438. The poles, wires, and street lamps in an electric-light system are a local improvement the cost of which may be assessed against the person benefited: *Ewart v. Western Springs*, *supra*.

² See *Reinken v. Fuehring*, 130 Ind. 382; *Sears v. Boston*, 173 Mass. 71; *Phillips Academy v. Andover*, 175 Mass. 118; *State v. Reis*, 38 Minn. 371.

³ It was held in *New York Life Ins. Co. v. Prest*, 71 Fed. Rep. 815, that sprinkling the streets of a city is not such an improvement of the abutting property as to justify the imposition thereupon of a special assessment for the expense, and an act authorizing such imposition is in violation of fundamental law and not within the taxing power. In *Chicago v. Blair*, 149 Ill. 310, street sprinkling was held not to be a "local improvement" within the meaning of the statute authorizing cities and villages to make such improvements by special assessment. And in *Pettit v. Duke*, 10 Utah 311, it was decided that a city authorized to levy taxes for local improvements for "sewerage, paving, and other like purposes," could not levy such assessments for sprinkling streets.

Fencing townships. It has been held competent in North Carolina to provide by law for the construction of a fence around whole townships or even whole counties, with gates on the highways, and for levying the expense by special tax; and the power to do so has been considered properly referable to the power to lay special assessments. This provision is made in view of the special local circumstances.¹

Other special cases. No doubt the legislature has power to provide for special assessments to meet the expenses of other improvements; and this power is sometime, spoken of as if it was practically one that was unrestricted.² But other cases sanction no such broad doctrine, and justify us, as we think, in saying that, to warrant the levy of local assessments, there must not only exist in the case the ordinary elements of taxation, but the object must also be one productive of special local benefits, so as to make applicable the principles upon which special assessments have hitherto been upheld.³ A clear case of abuse of legislative authority, in imposing the burden of a public improvement on persons or property not specially benefited, would undoubtedly be treated as an excess of power and void.⁴

¹ *Cain v. Commissioners*, 86 N. C. 8; *Shuford v. Commissioners*, 86 N. C. 552; *Greene County Com'rs v. Lenoir County Com'rs*, 92 N. C. 180.

² See particularly the remarks of *Grover, J.*, in *Litchfield v. Vernon*, 41 N. Y. 123, 134, and what is said in *State v. Elizabeth*, 37 N. J. L. 330. A statute authorizing the construction of public cisterns at the cost of lot-owners, held constitutional: *Steam-Forge Co. v. Anderson (Ky.)*, 37 S. W. Rep. 617; *Abraham v. Louisville (Ky.)*, 62 S. W. Rep. 1041.

³ "Local assessments on particular estates are permissible only when founded on special and peculiar benefits to the property, and then only to an amount not exceeding such benefits." *Sears v. Street Com'rs*, 173 Mass. 350. A city under its power over street and alleys cannot improve its market property at the expense of the adjoining property of individ-

uals, and it may be enjoined from collecting assessments for the purpose: *Fort Wayne v. Schaafl*, 106 Ind. 66.

⁴ See *Washington Avenue*, 69 Pa. St. 352, approving *Hammett v. Philadelphia*, 65 Pa. St. 146. In *Allen v. Drew*, 44 Vt. 174, 188, *Redfield, J.*, says: "We have no doubt that a local assessment may so far transcend the limits of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name." Remarks equally decided are made in *Louisville v. Rolling Mill Co.*, 3 Bush 416, 423; *Hood v. Lebanon Trustees (Ky.)*, 15 S. W. Rep. 516; *James v. Louisville (Ky.)*, 40 S. W. Rep. 912; and *Norfolk v. Chamberlain*, 89 Va.

3. Objections in point of policy and justice. If the design of the present work embraced the discussion of legislative policy, it would be interesting to give, with some degree of fullness, the views which various judges have expressed regarding the justice of assessing the cost of public improvements upon property supposed to be specially benefited. Some judges have spoken of these assessments as eminently equitable and proper; others seem to have regarded the power to lay them as an extreme power, which generally operated oppressively, while still others have undertaken to indicate some line of division of expense, which should be drawn in such cases, between the public and the parties to be specially assessed; putting, for instance, one-half the expense on the former and one-half upon the latter. But, in truth, there is no universal rule of justice upon which such assessments can be made. Sometimes almost the whole benefit accrues to a few. Sometimes the benefit is distributed with something like regularity through the community. An apportionment of the cost that would be just in one case would be unfair and oppressive in another. For this very reason the power to determine when a special assessment shall be made, and on what basis it shall be apportioned, is wisely confided to the legislature, and could not, without the introduction of some new principle in representative government, be placed elsewhere. We dismiss this topic, therefore, with the single remark, that with the wisdom or unwisdom of special assessments, when ordered in cases in which they are admissible at all, the courts have no concern, unless there is plainly and manifestly such an abuse of power as takes the case beyond the just limits of legislative discretion.¹

196. One lot-owner cannot be made to bear the burden of a street assessment caused by another's default or exemption: *Thornton v. Clinton*, 148 Mo. 648.

¹*Speer v. Athens*, 85 Ga. 49; *Kelly v. Chadwick*, 104 La. 719; *Raleigh v. Peace*, 110 N. C. 32; *Rolph v. Fargo*, 7 N. D. 640. Expressions on the subject by judges have been very numerous, but they have commonly been general remarks called out by special and somewhat exceptional

cases. We refrain from collecting them for the reason expressed in the text; if the matter is of legislative cognizance, the courts and the profession as such have no concern with it. We may, nevertheless, copy what has been said in one case, because it probably expresses the general views which have prevailed in legislation. "Their intrinsic justice strikes every one. If an improvement is to be made, the benefit of which is local, it is but just that the

4. Objections under constitutional principles and provisions. These have been made to special assessments on various grounds.

That they take property without due process of law. If these assessments are made in an exercise of the sovereign taxing power, what has already been said on the subject is equally applicable here.¹ The taxing power proceeds on its own methods, and the rules of the common law bend and conform to them. That these assessments are an exercise of the taxing power has over and over again been affirmed, until the controversy must be regarded as closed.²

property benefited should bear the burthen. While the few ought not to be taxed for the benefit of the whole, the whole ought [not] to be taxed for the few. A single township in a county ought not to bear the whole county expense; neither ought the whole county to be taxed for the benefit of a single township; and the same principle requires that taxation for a local object, beneficial only to a portion of a town or city, should be upon that part only. General taxation for a mere local purpose is unjust; it burdens those who are not benefited, and benefits those who are exempt from the burden." *Leonard, J., in Lockwood v. St. Louis*, 24 Mo. 20, 22. On the other hand, *Church, Ch. J., in Guest v. Brooklyn*, 69 N. Y. 506, 516, condemns the whole system as "a species of despotism that ought not to be perpetuated under a government which claims to protect property equally with life and liberty. Besides its manifest injustice, it deprives the citizen practically of the principal protection — aside from constitutional restraints — afforded in a free country against unjust taxation: the responsibility of the representative for his acts to his constituents." And see *Norfolk v. Chamberlain*, 89 Va. 196, 236.

¹ *Ante*, chapter II. A statute pro-

viding for assessing property benefited for the cost of street improvements is not unconstitutional as not providing a tribunal to make such assessment, if it provides that the city council shall be such tribunal: *Leeds v. De Fries* (Ind.), 61 N. E. Rep. 930. The provision of the constitution which prohibits the taking of property without due process of law is not infringed by a statute providing for the levy of assessments for paving streets, where publication of a resolution gives due notice to the landowner of the commencement of the proceeding, and the owner is required to be made a party to a suit to enforce a lien on his property for the tax assessed, and is entitled to notice thereof and to his day in court: *Springfield v. Weaver*, 137 Mo. 650. A statute preventing a property owner from contesting the validity of an assessment for a public improvement after the expiration of forty days after proceedings therefor based on constructive notice were commenced, and regardless of the fact whether the owner had actual notice, does not provide due process of law. There may be notice by publication, but the time is unreasonable: *Hayes v. Douglas County*, 92 Wis. 429.

² See *Bridgeport v. New York & N. H. R. Co.*, 36 Conn. 255; *Wabash E.*

That they take property, i. e., money, and appropriate it to the public use without compensation. This objection would seem to fall with the last. If special assessments are taxes, the compensation is conclusively presumed to be received by those who pay them. It is only on the assumption that they are laid in the exercise of the power of eminent domain that the objection could have any force whatever. But the distinction between the two cases is very clear. "Taxation exacts money or services from individuals as and for their respective shares of contribution to any public burden. Private property taken for any public use, by right of eminent domain, is taken, not as the owner's share of contribution to a public burden, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty, and creates no obligation to repay otherwise than in the proper application of the tax. Taxation operates upon a community, or upon a class of persons in a community, and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals."¹

R. Co. v. Commissioners, 134 Ill. 384; Yeomans v. Riddle, 84 Iowa 147; Lexington v. McQuillan's Heirs, 9 Dana 513; Bradley v. McAtee, 7 Bush 667; Baltimore v. Hughes, 1 Gill & J. 480; Baltimore v. Cemetery Co., 7 Md. 517; Howard v. Independent Church, 18 Md. 451; Dorgan v. Boston, 12 Allen 223; Hoyt v. East Saginaw, 19 Mich. 39; Williams v. Cammack, 27 Miss. 209; People v. Brooklyn, 4 N. Y. 419; Protestant Episcopal School, 31 N. Y. 574; Howell v. Buffalo, 37 N. Y. 267; Raleigh v. Peace, 110 N. C. 32; Scoville v. Cleveland, 1 Ohio St. 126; King v. Portland, 2 Or. 146; Pennock v. Hoover, 5 Rawle 291; Pennell's Appeal, 2 Pa. St. 216; Pray v. Northern Liberties, 31 Pa. St. 69; Gault's Appeal, 33 Pa. St. 94; Commonwealth v. Woods, 44 Pa. St. 113; Matter of Dorrance St., 4 R. I. 230.

¹ *Ruggles*, J., in *People v. Brooklyn*, 4 N. Y. 419, 424. And see *Nichols v. Bridgeport*, 23 Conn. 189, 205, per *Hinman*, J.; *Litchfield v. Vernon*, 41 N. Y. 123, 133, per *Grover*, J.; *People v. Lawrence*, 41 N. Y. 140, per *Mason*, J.; *Scoville v. Cleveland*, 1 Ohio St. 126, 135, per *Ranney*, J.; *In re Washington Av.*, 69 Pa. St. 352, 355, 361, per *Agnew*, J.; *Matter of Dorrance St.*, 4 R. I. 230, per *Ames*, J. The following cases are also in point: *Peoria v. Kidder*, 26 Ill. 351; *Sutton's Heirs v. Louisville*, 5 Dana 28; *Lexington v. McQuillan's Heirs*, 9 Dana 513; *Howell v. Bristol*, 8 Bush 493; *Baltimore v. Cemetery Co.*, 7 Md. 517; *Jones v. Boston*, 104 Mass. 461; *Woodbridge v. Detroit*, 8 Mich. 278; *State v. Rapp*, 39 Minn. 65; *Griffin v. Dogan*, 48 Miss. 11; *Garrett v. St. Louis*, 25 Mo. 205; *Uhrig v. St. Louis*, 44 Mo. 458; *Keith v. Bingham*, 100 Mo. 300;

Attention to the distinction here pointed out will make clear the fact that special assessments are not an exercise of the eminent domain. It is certain that when they are levied according to benefits received, they cannot be. The theory of the law is, that full compensation is then received in every instance.¹ It is not, it is true, a compensation made in money, but, as in every other case of taxation, the person taxed is to receive a benefit from the expenditure of the moneys collected. The benefit which one receives in the enhanced value of his property, from the public expenditure, is as real and as substantial as that which he receives in the protection afforded to his person and his estate. The difficulty, if any, in the case must lie back of the nature of compensation, and must apply, rather, to the basis of assessment. If taxation were neces-

St. Joseph v. Farrell, 106 Mo. 437; Springfield v. Baker, 56 Mo. App. 637; State v. Newark, 35 N. J. L. 168, 171; Hill v. Higdon, 5 Ohio St. 243; Reeves v. Wood County Treasurer, 8 Ohio St. 333; Malloy v. Marietta, 11 Ohio St. 636; Allen v. Drew, 44 Vt. 174, 187; Holton v. Milwaukee, 31 Wis. 27. "The foundation of the power to levy special assessments is, no doubt, the general taxing power of the state, not the police power or the right of eminent domain:" Chicago, R. I. & P. R. Co. v. Ottumwa, 112 Iowa 300; Hackworth v. Ottumwa (Iowa), 87 N. W. Rep. 424. There are, nevertheless, some cases in which it has been held that a special assessment on land for a local improvement was an unlawful appropriation of property. One of these is Louisville v. Rolling Mill Co., 3 Bush 416, in which the defendants were assessed the expense of filling up the street in front of their property to an extent that greatly diminished its value, and required the erection of a high wall to protect their buildings. The case was such that the property received is in no shape any compensation for the money exacted, and the objections in point of constitutional law are forcibly stated in the opinion. In Zoeler v. Kellogg, 4 Mo. App. 163, it was decided that if an assessment exceeds the value of the lot assessed it is unconstitutional. In Norwood v. Baker, 172 U. S. 269, it is said: "While abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it, that is by benefits not shared by the general public; and taxation of the abutting property for any substantial excess of such expense over such benefits will, to the extent of such excess, be a taking of private property for public use without just compensation." But these, it will be seen, are special and very peculiar cases. See, also, State v. Elizabeth, 37 N. J. L. 330. The whole cost of an improvement by drainage cannot be laid upon one lot when two lots are benefited: Gilkerson v. Scott, 76 Ill. 509.

¹See Palmer v. Way, 6 Colo. 106; Crawford v. People, 82 Ill. 557; White v. People, 94 Ill. 604; State v. Jersey City, 42 N. J. L. 97; Raymond v. Cleveland, 42 Ohio St. 522.

sarily, under all circumstances, by values, it would be conceded that an apportionment by benefits must be inadmissible. But it has already been shown that value is only one of many standards of apportionment, and when others are admissible, it would seem to devolve upon those who deny the right of assessing by benefits, to point out the element of taxation, if any, which is absent when that basis is fixed upon. If apportionment is really made in view of actual benefits in the increased value of property, it is presumptively as fair and equal, and therefore as well supported by the advantages the taxpayer receives from the government, as any other. It must consequently be equally admissible with any other. It cannot be said that the taxpayer has been required to surrender for the public use something beyond his just proportion, when the demand has been made under a rule expressly framed to reach that very proportion and no more; a rule, too, that in its basis is so fair that it ought, perhaps, to be preferred to all others, if fairly and honestly applied.¹

That they violate express constitutional provisions securing uniformity in taxation. These objections have been made under a number of the state constitutions, and require examination separately.

Alabama. In this state a constitutional provision that "all taxes levied on property in this state shall be assessed in exact proportion to the value of such property" has been held inapplicable to special assessments laid against abutting property for the improvement of a street.²

Arkansas. A constitutional provision was that "all property shall be taxed according to its value, the manner of ascertaining which to be as the general assembly shall direct, making the same equal and uniform throughout the state. No one species of property shall be taxed higher than another species of property of equal value. The general assembly shall have power to tax merchants, bankers, peddlers, and privileges in such manner as may be prescribed by law." This provision,

¹ The objections to the system and the answer to them are forcibly presented by *Hinman, J.*, in *Nichols v. Bridgeport*, 23 Conn. 189.

² *Birmingham v. Klein*, 89 Ala. 461, overruling *Mobile v. Dargan*, 45 Ala. 310, and *Mobile v. Street R. Co.*, 45 Ala. 322.

it was held, applied to the state revenue, and not to taxes levied for local purposes,¹ and therefore it did not preclude the assessment of a levy tax on the lands specially benefited.² But under a provision in a later constitution, that all property should be taxed by a uniform rule "according to its true value in money," it was held that paving taxes must be assessed according to the value of the lots assessed, and that it was not competent to apportion an assessment for paving according to frontage.³ More recently it has been held that the right to levy an assessment under a constitutional provision authorizing the legislature to provide for assessments for local improvements is not limited by another provision which defines the general taxing power of the state.⁴

California. There are provisions in the constitution that "all property in the state shall be taxed in proportion to its value," and that "taxation shall be equal and uniform throughout the state." The constitution also makes provision for conferring the power of taxation and assessment on "municipal corporations." An act of the legislature providing that the expense of a street improvement shall be assessed on property fronting on the street, in proportion to its frontage, has invariably been held not to be in violation of the provisions regarding valuation, equality, and uniformity, but as being properly referable to the power of assessment, which had acquired a distinct meaning in other states before being introduced into the constitution of this state.⁵

¹ Washington v. State, 13 Ark. 752.

² McGhee v. Mathis, 21 Ark. 40. This case was reversed on error in the federal supreme court.

³ Peay v. Little Rock, 32 Ark. 31. An act which levies a tax for a local benefit upon part of the lands to be benefited, to the exclusion of others of the same class, violates the constitutional requirement of equality and uniformity: Davis v. Gaines, 48 Ark. 370. A provision in an act authorizing a tax for a local improvement that those who have already contributed shall be credited on their taxes with the amounts of their contributions is void: Ibid.

⁴ Keel v. Board of Directors, 59 Ark. 513.

⁵ Burnett v. Sacramento, 12 Cal. 76; Blanding v. Burr, 13 Cal. 343; Emery v. Gas Co., 28 Cal. 345; Emery v. Bradford, 29 Cal. 75; Walsh v. Mathews, 29 Cal. 123; Taylor v. Palmer, 31 Cal. 240; Crosby v. Lyon, 37 Cal. 242; Chambers v. Satterlee, 40 Cal. 497; Reclamation District v. Hagar, 6 Sawy. 569. The fact that an assessment is called a tax in the statute will not preclude its being sustained as an assessment: People v. Austin, 47 Cal. 353. A street was improved and city bonds issued therefor, and to pay the same an annual levy was

Colorado. The constitution provides that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal." This, it is held, refers to the ordinary public taxes, and does not prohibit municipal assessments on abutting property for street improvements.¹

Florida. Under constitutional provisions for a "just valuation of all property," a "uniform and equal rate of taxation," and that all property taxed for municipal purposes "shall be taxed upon the principle established for state taxation," it is not incompetent to provide that the expense of altering, extending, and opening streets shall be levied by special assessment on the lots benefited, not restricting the levy to the lots on the street, but extending it as far as the benefits extend. "A more just or fairer course could not have been adopted; and it would be strange indeed if the power were not in the legislature to prescribe it."²

Georgia. The constitutional requirement that taxation shall be equal and uniform does not prohibit special assessments on property benefited for the cost of local improvements in streets.³

Illinois. The former constitution of this state contained this section: "That the corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." This, it was held, forbade an assessment of the cost of improving a street upon the real estate fronting thereon in proportion to frontage;

made on the property benefited. Held an assessment: Ibid. But a claim for compensation for work done under an abortive contract with the municipality cannot be satisfied by a special assessment. If a public claim at all, it presents a case for taxation: *Matter of Market St.*, 49 Cal. 546.

¹ *Denver v. Knowles*, 17 Colo. 204, overruling *Palmer v. Way*, 6 Colo. 106, and *Wilson v. Chilcott*, 12 Colo. 600.

² *Egerton v. Green Cove Springs*, 19 Fla. 140.

³ *Hayden v. Atlanta*, 70 Ga. 817; *Speer v. Athens*, 85 Ga. 49.

the principle of equality and uniformity applying to local as well as general taxes, and such a special assessment being neither equal nor uniform within the meaning of the constitution. But the opinion was at the same time expressed that to assess to each lot the special benefit it would derive from the improvement, charging such benefit upon the lot, leaving the residue of the cost to be paid by equal and uniform taxation, would be constitutional.¹ But to make the improvement at the expense of lot owners, without regard to the *actual* benefit received, would not be equal and uniform, and consequently would be forbidden.² And so would be an assessment which exempted improvements from its operation.³ The present constitution provides that "the general assembly may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment or by special taxation of contiguous property, or otherwise."⁴ For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property imposing

¹ Chicago v. Larned, 34 Ill. 203. And see Ottawa v. Spencer, 40 Ill. 211; Chicago v. Baer, 41 Ill. 306; Bedell v. Hall, 44 Ill. 91; Wright v. Chicago, 46 Ill. 44.

² St. John v. East St. Louis, 50 Ill. 92. See Lee v. Ruggles, 62 Ill. 427.

³ Primm v. Belleville, 59 Ill. 142.

⁴ "The difference between special assessments and special taxation . . . lies mainly in the manner of determining the benefits. In special taxation the body enacting the ordinance determines that the benefits are equal to the cost . . . while in special assessments the benefits are assessed by the commissioners, and are always reviewable by a jury." Chicago Park Com'rs v. Farber, 171 Ill. 146. See, further, Craw v. Tolono, 96 Ill. 255; Enos v. Springfield, 113 Ill. 65; Galesburg v. Searles, 114 Ill. 217; Sterling v. Galt, 117 Ill. 11; Davis v. Litchfield, 145 Ill. 313; Chicago & A. R. Co. v. Joliet, 153 Ill. 649; Western Springs v. Hill,

177 Ill. 684. In West Chicago Park Com'rs v. Farber, *supra*, a levy for the purpose of collecting money from owners of property contiguous to a boulevard for the purpose of paying for improvements upon said boulevard was held to be a special assessment and not a special tax. In Bloomington v. Latham, 142 Ill. 462, it was decided that a statute providing that in the same petition in which land is condemned for streets and alleys the city or village might file a supplemental petition "for the purpose of raising the amount necessary to pay for the property taken or damaged" does not authorize a resort to assessment by special taxation. And it was held in Bloomington v. Chicago & A. R. Co., 134 Ill. 451, that the statute empowering cities and villages to make local improvements by special taxation does not authorize them to provide in that way for the erection of a railroad bridge across a city street.

the same." Under this provision it is competent to impose on the contiguous property the cost of constructing a sidewalk, and there is no necessity for making it upon the basis of actual benefits, as in the case of what are more properly called special assessments.¹ In the making and improving of streets by special assessments it is competent to charge county property with its proportion of the special benefit,² and to charge the lots of non-residents with their proportion, but not to make the demand a personal liability against them.³

Indiana. One section of the constitution of this state declares that "the general assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such rules and regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes as may be especially exempted by law." Another forbids the passing of local or special laws "for the assessment and collection of taxes for state, county, township, or road purposes." These provisions do not preclude street and other local improvements being

¹ *White v. People*, 94 Ill. 604; *Craw v. Tolono*, 96 Ill. 255; *Enos v. Springfield*, 113 Ill. 65; *Galesburg v. Searles*, 114 Ill. 217; *Watson v. Chicago*, 115 Ill. 78; *Murphy v. People*, 120 Ill. 234; *Springfield v. Green*, 120 Ill. 269. It is not, however, competent to assess all the cost of an improvement upon a part of the property benefited, leaving other property equally benefited exempt: *Davis v. Litchfield*, 145 Ill. 313, and cases cited. The tax for connecting all the buildings on a street with the water and sewer mains must be levied on the adjoining property on some principle of equality, and not assessed on each lot according to the cost of connections to that lot: *Palmer v. Danville*, 154 Ill. 156, distinguishing *Warren v. Chicago*, 118 Ill. 329. The rule of uniformity is observed by an ordinance for a special assessment to

pay for paving that part of a street not occupied by a street railway, although such ordinance does not provide for assessing any part of the cost against the company's property; the burden imposed upon the company by its franchise to pave the part of the street occupied by it being deemed an equivalent for the assessment: *Lightner v. Peoria*, 150 Ill. 83; *Billings v. Chicago*, 167 Ill. 337. An ordinance that the cost of paving so much of a street as lay in the right of way of any railroad shall be paid by special tax on the right of way is not void for lack of uniformity in assessment: *Chicago, R. I. & P. R. Co. v. Moline*, 158 Ill. 64.

² *McLean County v. Bloomington*, 106 Ill. 209.

³ *Craw v. Tolono*, 96 Ill. 255; *Virginia v. Hall*, 96 Ill. 278.

made, and the expense borne by means of an assessment upon property specially benefited.¹

Kansas. One provision of the constitution is, that "the legislature shall provide for a uniform and equal rate of assessment and taxation," and another that "provision shall be made by general laws for the organization of cities, towns, and villages, and their power of taxation and assessment, etc., shall be so restricted as to prevent abuse of such power." These do not deprive the legislature of power to authorize local improvements of streets at the cost of the adjacent property.²

Kentucky. The provisions of the constitution requiring uniformity of taxation, and taxation according to value, are merely declaratory of what always was the law of taxation within the state, and do not render invalid the assessment on abutting property of a part of the cost of a street improvement.³

Louisiana. The provision of the constitution, that "taxation shall be equal and uniform throughout the state," does not preclude special assessments on property benefited by local improvements.⁴

Maine. Here the constitution provides that "all taxes upon real and personal estate, assessed by authority of this state,

¹ *Goodrich v. Turnpike Co.*, 26 Ind. 119; *Bright v. McCullough*, 27 Ind. 223; *Palmer v. Stumph*, 29 Ind. 329; *Reinken v. Fuehring*, 130 Ind. 382. And see *La Fayette v. Jenners*, 10 Ind. 70; *Bank of State v. New Albany*, 11 Ind. 139; *Anderson v. Drainage Co.*, 14 Ind. 199; *Turpin v. Eagle Creek, etc. Co.*, 48 Ind. 45.

² *Hines v. Leavenworth*, 3 Kan. 186. A statute providing for an assessment for paving a street without considering the value of the improvements, held not void as providing for an unequal levy: *Moore v. Paola* (Kan.), 66 Pac. Rep. 1040.

³ *Maddux v. Newport* (Ky.), 14 S. W. Rep. 957; *Holzhauser v. Newport*, 94 Ky. 396; *Gosnell v. Louisville*, 104 Ky. 201.

⁴ *Municipality v. Dunn*, 10 La. An. 57; *New Orleans v. Elliott*, 10 La. An. 59; *Yeatman v. Crandall*, 11 La. An. 220; *Draining Co. Case*, 11 La. An. 388; *Municipality v. Guillotte*, 14 La. An. 297; *Wallace v. Shelton*, 14 La. An. 498; *Bishop v. Marks*, 15 La. An. 147; *Matter of Opening Streets*, 20 La. An. 497; *Charnock v. Fordoche, etc. Co.*, 38 La. An. 323; *Excelsior Planting, etc. Co. v. Green*, 39 La. An. 455; *Missouri, K. & T. Trust Co. v. Smart*, 51 La. An. 416; *Shreveport v. Prescott*, 51 La. An. 1895. To divide the expense of an improvement between the city and the property specially benefited is no violation of the rule of uniformity: *State v. New Orleans*, 15 La. An. 354.

shall be apportioned and assessed equally, according to the just value thereof." To this a statutory provision that one-half of the cost of drains and sewers to be constructed by a city shall be assessed upon lots in proportion to the benefit done them is not repugnant.¹

Massachusetts. The constitution gives full power and authority to the general court, among other things, "to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of, and persons resident and estates lying within, the said commonwealth." This is not violated by authorizing a town, in which the state agricultural college is located, to raise by tax and pay an exceptional portion of the expense.² Nor does it preclude local, street, or drain assessments being laid on the property benefited, in proportion to the benefit which each parcel of property will receive, or may be supposed to receive, therefrom. Such a levy would be neither unreasonable nor unproportional.³

¹ *Auburn v. Paul*, 84 Me. 212.

² *Merrick v. Amherst*, 12 Allen 500.

³ *Dorgan v. Boston*, 12 Allen 223, 234. "In requiring that taxes should be proportional and reasonable, the framers of the constitution intended to erect a barrier against an arbitrary, unjust, unequal, or oppressive exercise of the power: *Oliver v. Washington Mills*, 11 Allen 268. If, for instance, the legislature should arbitrarily designate a certain class of persons on whom to impose a tax, either for general purposes or for a local object of a public nature, without any reference to any rule of proportion whatever, having no regard to the share of public charges which each ought to pay relatively to that borne by all others, or to any supposed peculiar benefit or profit which would accrue to those made subject to the tax which would not inure to others, so that in effect the burden would fall on those who had been selected only for the reason that they might be made subject to the tax,

we cannot doubt that the imposition of it would be an unlawful exercise of power not warranted by the constitution, against the exercise of which a person aggrieved might sue for protection. But no such case is made by the present bill. This part of the plaintiff's case rests on the broad proposition that the legislature have no power to authorize the assessment of the cost of a work of a public nature, but the construction of which will be of special and peculiar benefit to adjacent property, on the abutting estates in proportion to their value. For the reason already given, we are of the opinion that such a tax is neither unreasonable nor unproportional, and that it was competent for the legislature to impose it in the mode prescribed by the statute:" *Ibid.* A statute cannot be attacked as imposing a disproportionate tax because, while providing for the assessment of special benefits, from the construction of a public way, it does not also require the gen-

Michigan. The provisions that "the legislature shall provide a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law," and that "all assessments hereafter authorized shall be on property at its cash value," only relate to the valuation, assessment, and taxation of property for general purposes, and, consistently with them, local assessments may be laid for local improvements, either in proportion to benefits or in proportion to frontage.¹

Minnesota. Under a provision that "all taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state," a special assessment on lands in proportion to the benefits received from the construction of a public road was held inadmissible.² Subsequently the provision quoted was amended by adding: "Provided that the legislature may, by general law or special act, authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements, or upon the property to be benefited by such improvements, without regard to cash valuation, and in such manner as the legislature may prescribe." In adopting this amendment it was "not intended to reject or modify, in respect to taxes of this class, so just and reasonable a principle as that 'they shall be as nearly equal as may be,' and whatever basis of apportionment is adopted it must include the idea of equality."³ A statute authorizing an assessment on every lot in a

eral benefit to the public to be assessed so as to share the expense: *Lincoln v. Street Com'rs*, 176 Mass. 210. But a statute requiring an assessment for a sewer to be made according to the lineal measurement of the land along the sewer, thus doubly assessing a parcel which receives but slight additional benefit from a turn in the sewer, is in such respect unconstitutional: *Dexter v. Boston*, 176 Mass. 247.

¹ *Motz v. Detroit*, 18 Mich. 495; *Hoyt v. East Saginaw*, 10 Mich. 39;

Cass Farm Co. v. Detroit, 124 Mich. 433, affirmed in 181 U. S. 396. See *Lefevre v. Detroit*, 2 Mich. 586; *Williams v. Detroit*, 8 Mich. 274; *Warren v. Grand Haven*, 30 Mich. 24.

² *Stinson v. Smith*, 8 Minn. 366. Here it was held that an assessment for grading a street was void because not apportioned upon the basis of the valuation of the property.

³ This amendment authorizes such legislation in respect to counties: *Dowlan v. Sibley County*, 36 Minn. 430.

city of an annual frontage tax per lineal foot, where water pipes are laid in front of such lot, is not unconstitutional.¹

Mississippi. The constitution requires that "taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law." There is nothing in this which takes from the legislature the power to impose a tax on a special district for a local improvement, and municipal corporations may be authorized to assess the expense of a street improvement on the lots fronting on the street.² The provision has no application to taxes for local improvements,³ and it is, therefore, competent to lay a levee tax on lands by the acre instead of by valuation.⁴

Missouri. An assessment for street improvements on a basis of benefits does not contravene the provision of the constitution that "all property subject to taxation shall be taxed in

¹ *Noonan v. Stillwater*, 33 Minn. 198. "The gist of the decision in *Noonan v. Stillwater* . . . is that, while the amendment empowered the legislature to apportion and assess according to frontage, it does not authorize an assessment on that plan wholly disregarding the fundamental rule upon which special assessments are made, namely, that of benefits." *State v. Pillsbury*, 82 Minn. 359. The latter case holds that no plan can be adopted which will result in gross inequality of taxation. The burden must be apportioned as uniformly and as equally as may be; and an assessment is void which is based upon the arbitrary determination, by a resolution passed years in advance, of the amount to be charged per lineal foot of frontage for a sewer, without reference to the benefits arising out of the improvement. The constitutional provision requiring uniformity of taxation is not contravened by a statute requiring a partial assessment for local improvements of 85 per cent of the estimated cost after the contracts for the improve-

ments are let but before they are completed: *State v. District Court*, 61 Minn. 542. A statute which provides for assessing property for the same benefits as under another section of the same statute had been deducted from the value of the land taken for park purposes is unconstitutional as being unequal taxation: *State v. District Court*, 66 Minn. 161. A statute providing in the interest of the public health, comfort, and convenience, for the drainage of land, and that the cost be assessed against the lands benefited and improved thereby, is not open to the objection that such assessment is unequal taxation: *Lien v. Board of Com'rs*, 80 Minn. 58; *State v. Lewis Co.*, 72 Minn. 87, 82 Minn. 390.

² *Williams v. Cammack*, 47 Miss. 367. See *Smith v. Aberdeen*, 25 Miss. 458; *Alcorn v. Hamer*, 38 Miss. 652.

³ *Daily v. Swope*, 47 Miss. 367; *Vasser v. George*, 47 Miss. 713; *Macon v. Patty*, 57 Miss. 378; *Chrisman v. Brookhaven*, 70 Miss. 477.

⁴ *Daily v. Swope*, 47 Miss. 367. See *Macon v. Patty*, 57 Miss. 378.

proportion to its value.”¹ The same is true of assessments for levee purposes, which need not be made on the basis of valuation.²

Nebraska. Under a constitutional provision that the legislature shall provide for the organization of cities, and restrict their power of taxation, assessment, etc., the legislature may confer upon a city the power to make street improvements by laying special assessments upon the abutting lots.³

New York. In this state an assessment to pay for the expense of opening a street will be set aside where there has been a failure to apply a uniform rule of taxation.⁴

North Carolina. The constitution requires that taxes be imposed by a uniform rule upon moneys, credits, and investments, and upon real and personal property, according to its true value, and also, that “such as are levied by any county, city, town, or township shall also be uniform and *ad valorem* upon all property therein.” These provisions are held to be referable to taxation for objects in which all have a common interest;⁵ that they do not preclude the laying of special assessments by other standards than that of value; and that a law authorizing the board of county commissioners to assess upon two specified counties, or upon such townships therein as should request it by the application of a majority of the qualified voters, a special tax for the building of a fence around such counties or townships, with gates on the highways, and for keeping them in repair, was to be regarded as a law for the laying of special assessments, and was constitutional.⁶ So, also,

¹ *Garrett v. St. Louis*, 25 Mo. 505; *Uhrig v. St. Louis*, 44 Mo. 458; *Adams v. Lindell*, 72 Mo. 198; *Farrar v. St. Louis*, 80 Mo. 379; *St. Joseph v. Owen*, 110 Mo. 445. See *Neenan v. Smith*, 50 Mo. 525. One lot-owner cannot be made to bear the burden of a street assessment caused by another's default or exemption: *Thornton v. Clinton*, 148 Mo. 648.

² *Egyptian Levee Co. v. Hardin*, 27 Mo. 495.

³ *Hurford v. Omaha*, 4 Neb. 336; *Board of Directors v. Collins*, 46 Neb. 411.

⁴ *Monroe County v. Rochester*, 154 N. Y. 570.

⁵ *Young v. Henderson*, 76 N. C. 420.

⁶ *Simpson v. Commissioners*, 84 N. C. 158; *Cain v. Commissioners*, 86 N. C. 8; *Shuford v. Commissioners*, 86 N. C. 552; *Raleigh v. Peace*, 110 N. C. 32; *Hilliard v. Asheville*, 118 N. C. 845.

a city charter providing that part of the expense of a street improvement shall be assessed on the property abutting on each side of the street according to the "frontage" of the owner has been sustained.¹

North Dakota. The requirement of the constitution that laws shall be passed taxing by uniform rule all property according to its true cash value does not relate to local assessments, but only to general taxation;² and it is competent for the legislature to direct that all the expense of paving a city street shall be assessed against the abutting property in proportion to frontage.³

Ohio. The provision of the constitution that "laws shall be passed taxing, by a uniform rule, . . . all real and personal property according to its true value in money," will not preclude the levy and collection of assessments on the basis of benefits in the cases in which they are usually laid.⁴

Oklahoma. The organic act of this territory, which provides that "all property subject to taxation shall be taxed in proportion to its value," does not relate to special assessments made for municipal improvements.⁵

Oregon. The constitution provides that "all taxation shall be equal and uniform," and that the legislative assembly shall provide by law for uniform and equal rate of assessment and taxation." These provisions do not apply to special assessments for municipal improvements.⁶

¹ *Hilliard v. Asheville*, 118 N. C. 845.

² *Rolph v. Fargo*, 7 N. D. 640.

³ *Rolph v. Fargo*, 7 N. D. 640.

⁴ *Hill v. Higdon*, 5 Ohio St. 243; *Marion v. Epler*, 5 Ohio St. 250; *Ernst v. Kunkle*, 5 Ohio St. 520; *Reeves v. Treasurer of Wood Co.*, 8 Ohio St. 333; *Northern Ind. R. Co. v. Connelly*, 10 Ohio St. 159. See *Raymond v. Cleveland*, 42 Ohio St. 522; *Hastings v. Columbus*, 42 Ohio St. 585. This provision, however, applies as much

to the local taxes, properly so called, as to the state taxes: *Zanesville v. Richards*, 5 Ohio St. 589.

⁵ *Jones v. Holzapfel (Okl.)*, 68 Pac. Rep. 511. In constructing a sewer along lots assessed, there is no inference under the statute that the city council must apportion the assessment equally among such lots: *Ibid.*

⁶ *King v. Portland*, 2 Or. 146; *Cook v. Port of Portland*, 20 Or. 580; *Ladd v. Gambell*, 35 Or. 393. In *Cook v.*

Pennsylvania. The constitution provides that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." This, it has been decided, does not apply to special assessments for street improvements;¹ and it is not, therefore, violated by a statute conferring upon a town council authority to assess the cost of grading and paving a street against the adjacent property according to the front width thereof to the middle of the street,² or by a statute authorizing assessments and re-assessments for the cost of local improvements already made under an unconstitutional act.³ Another provision that by general laws, churches, etc., may be exempted from taxation, and forbidding the enactment of laws exempting other property from taxation, relates only to taxes proper, and not to special assessments for local improvements,⁴ and is not contravened by a statute authorizing a city to exonerate from city taxes property fronting on a street previously paved at the expense of the abutting owners.⁵

Rhode Island. A constitutional provision that "the burdens of the state ought to be fairly distributed among its citizens" is not inconsistent with an act which provides for the laying out of a street, and the assessment by commissioners of one-half the expense on adjoining proprietors, in proportion to

Port of Portland, *supra*, a statute incorporating certain cities for the purpose of improving the navigation of certain rivers between those cities and the sea, was held not to grant a power in contravention of the clause of the constitution quoted in the text. In *Ladd v. Gambell*, *supra*, a statute providing that owners whose assessments exceed twenty-five dollars may pay such assessments in instalments, and that the city may issue interest-bearing bonds for the amount of deferred assessments to pay for such improvements, is not an abuse of the legislative discretion, and is valid.

¹ *Chester v. Black*, 132 Pa. St. 568; *Beaumont v. Wilkesbarre*, 142 Pa. St. 198. See *Protestant Orphan Asylum's Appeal*, 111 Pa. St. 135.

² *Beaumont v. Wilkesbarre*, 142 Pa. St. 198. The fact that the lots fronting on a street differ somewhat in depth and value does not of itself render void for inequality assessments against them according to frontage for the improvement of the street: *Ibid*.

³ *Chester v. Black*, 132 Pa. St. 568.

⁴ *In re Broad Street*, 165 Pa. St. 475.

⁵ *Erie v. Griswold*, 184 Pa. St. 435.

the benefits received; the assessments to any one not to exceed the benefits.¹

South Carolina. The constitution provides that taxes must be uniform in respect to persons and property within the jurisdiction of the body imposing the same. This is contravened by a statute authorizing city authorities to assess upon the abutting land-owners two-thirds of the cost of paving the roadway in a street.²

South Dakota. The constitution of this state requires all taxes to be imposed according to the value of the property, equally and uniformly, and limits to municipalities local improvements by special taxation, which must even then be uniform with respect to all persons and property within the municipality. These provisions are not infringed by an ordinance providing for special assessments according to the number of feet abutting upon a street;³ but they are violated by a statute providing for the construction of an artesian well and of water-courses by a direct assessment upon land to be adjusted "with reference to the relative distance of such lands from the well itself and the water-courses."⁴

Tennessee. It is held that the provisions of the constitution that "all property" with certain specific exceptions shall be

¹ Matter of Dorrance St., 4 R. I. 230. In the same case it is said that such an act is not invalid by reason of allowing the local authorities a discretion to levy the tax in the method adopted, or some other. And as to assessing by benefits, *Ames*, Ch. J., gives instances of assessments for payment for houses pulled down in populous towns to check the spread of conflagrations, and for the expense of watchmen in compact portions of cities. Sewer assessments are not, in Rhode Island, unconstitutional, as violating the constitutional provision requiring uniform taxation, because made in accordance with a fixed rule to be applied in all cases, and not in proportion to the benefit received: *Cleveland v.*

Tripp, 13 R. I. 50; *Bishop v. Tripp*, 15 R. I. 466.

² *Mauldin v. City Council*, 42 S. C. 293. Under the constitutional requirement of uniformity and valuation, and under other provisions to the effect that exemptions from taxation are those named in the constitution itself, that taxes must be for public purposes, and that taxation by municipal corporations must be for corporate purposes, it was held that special assessments should not be laid for the improvement of city sidewalks, there being no power to subdivide a city into tax-districts: *Mauldin v. City Council*, 53 S. C. 516.

³ *Tripp v. Yankton*, 10 S. D. 516.

⁴ *Turner v. Hand County*, 11 S. D. 348.

taxed, and that all taxable property "shall be taxed according to its value," apply to all taxation, special assessments as well as general taxes.¹

Texas. The constitutional provision that "taxation shall be equal and uniform throughout the state" is not violated by a statute for the levy of special assessments for local improvements, as they are not taxes within the meaning of that requirement.²

Virginia. The provisions of the constitution that "taxation, whether imposed by the state, county, or corporate bodies, shall be equal and uniform," that "all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law," and that "no one species of property . . . shall be taxed higher than any other species of property of equal value," have been held to apply to the general burdens imposed for state and municipal purposes, and not to special or local assessments, which are a peculiar species of taxation.³ In later decisions, however, the earlier cases have been limited if not directly overruled; and the supreme court of the state, expressly disapproving the New York case which has been referred to so often in this chapter,⁴ has questioned whether the legislature has power to confer upon a city authority to levy local assessments for public improvements.⁵ A statute making a special assessment the personal debt of the owner of the property imposes, in that respect, a system of taxation which is not equal and uniform.⁶

Washington. Here the constitution provides that "taxes shall be equal and uniform, and according to value; but this

¹ *McBean Co. v. Chandler*, 9 Heisk. 349; *State v. Butler*, 2 Lea 419; *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 160.

² *Roundtree v. Galveston*, 42 Tex. 612; *Taylor v. Boyd*, 63 Tex. 533.

³ *Norfolk v. Ellis*, 26 Grat. 224; *Sands v. Richmond*, 31 Grat. 571; *Richmond & A. R. Co. v. Lynchburg*, 81 Va. 473; *Davis v. Lynchburg*, 84 Va. 861; *Violett v. Alexandria*, 92 Va. 561.

⁴ *People v. Brooklyn*, 4 N. Y. 419.

⁵ *Norfolk v. Chamberlain*, 89 Va. 196; *McCrowell v. Bristol*, 89 Va. 652. In the former case it was held that after condemning and paying for part of a lot for a street, the city had no authority to assess a tax against the residue for the peculiar benefits.

⁶ *Asberry v. Roanoke*, 91 Va. 562. See *McCrowell v. Bristol*, 89 Va. 652.

does not prohibit local assessments for street improvements.¹ Another constitutional provision that "for all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same," refers to general corporate purposes affecting all the people, but does not prohibit the levying of assessments on property benefited for the purpose of constructing an improvement which would benefit only a part of the corporation.²

West Virginia. Constitutional provisions that taxation shall be equal and uniform throughout the state, and that all property, real and personal, shall be taxed in proportion to its value, have no application to local assessments.³

Wisconsin. The constitution requires that "the rule of taxation shall be uniform." Also, that "it shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation and assessment," etc. It has been doubted if special assessments on a basis of benefits could be upheld under the provision first quoted; but it has been de-

¹ *Austin v. Seattle*, 2 Wash. St. 667. Similarly, it was held that Rev. Stat. U. S., § 1924, declaring that "all taxes shall be equal and uniform, and no distinction shall be made in the assessment between different kinds of property," has reference to general taxation only, not to special assessments for local municipal improvements, and is not violated by a city charter providing that assessments for local improvements shall be levied on real estate only: *Spokane Falls v. Browne*, 3 Wash. 84. A statute requiring the legislative body of a city of the first class to certify its assessments for street improvements, and directing him to collect them without providing additional compensation therefor, does not violate the provision quoted in

the text, as requiring taxpayers whose property is not benefited to bear the cost of collecting the assessments; the constitution being intended to secure uniformity and equality in the mode and rate of assessment, and not to restrict the power to direct the expenditure of funds collected by taxation: *State v. Mudgett*, 21 Wash. 99. It was held in *Seattle v. Yesler*, 1 Wash. 571, that an assessment on each lot fronting on a street for the whole cost of grading the street in front of that particular lot conflicts with a provision of law that assessments must be uniform and in accordance with the value of the property taxed.

² *Hansen v. Hanmer*, 15 Wash. 315.

³ *Douglass v. Harrisville*, 9 W. Va. 162.

cided that they may be, when properly authorized under the other.¹

These are the cases in which the constitutional objections have been most distinctly presented; but many other cases occupy, with more or less fullness, the same ground. The fact very clearly appears that, while there is not such a concurrence of judicial opinion as would be desirable, the overwhelming weight of authority is in favor of the position that all such provisions for equality and uniformity in taxation, and for taxation by value, have no application to these special assessments.² The reasons assigned vary in different cases, but they are nowhere set forth more clearly or strongly than in the leading case in New York. In that case, speaking of provisions made by the people in their constitutions, it is said: "They have not ordained that taxation shall be general, so as to embrace all persons or all taxable persons within the state, or within any district or territorial division of the state; nor that it shall or shall not be numerically equal, as in the case of a capitation tax; nor that it must be in the ratio of the value of each man's land, or of his goods, or of both combined; nor that a tax 'must be co-extensive with the district, or upon all the property in a district which has the character of and is known to the law as a local sovereignty.' Nor have they ordained or forbidden that a tax shall be apportioned according to the benefit which each taxpayer is supposed to receive from the object on which the tax is expended. In all these particulars the power of taxation is unrestrained.

"The application of any one of these rules or principles of apportionment to all cases would be manifestly oppressive and unjust. Either may be rightfully and wisely applied to the particular exigency to which it is best adapted.

"Taxation is sometimes regulated by one of these principles, and sometimes by another; and very often it has been apportioned without reference to the locality or to the taxpayer's

¹ Weeks v. Milwaukee, 10 Wis. 242; Lumsden v. Cross, 10 Wis. 282; Bond v. Kenosha, 17 Wis. 284. Other cases than those here cited, without expressly so declaring, recognize the general doctrine that the provisions

for uniform taxation by value are to be referred to general taxation, and that they do not exclude the laying of special assessments.

² Birmingham v. Klein, 89 Ala. 461; Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151.

ability to contribute, or to any proportion between the burden and the benefit. The excise laws, and taxes on carriages and watches, are among the many examples of this description of taxation. Some taxes affect classes of inhabitants only. All duties on imported goods are taxes on the class of consumers. The tax on one imported article falls on a large class of consumers, while the tax on another affects comparatively a few individuals. The duty on one article consumed by one class of inhabitants is twenty per cent. of its value, while on another, consumed by a different class, it is forty per cent. The duty on one foreign commodity is laid for the purposes of revenue mainly, without reference to the ability of its consumers to pay; as in the case of the duty on salt. The duty on another is laid for the purpose of encouraging domestic manufactures of the same article; thus compelling the consumer to pay a higher price to one man than he could otherwise have bought the article for from another. These discriminations may be impolitic, and in some cases unjust; but if the power of taxation upon importations had not been transferred by the people of this state to the federal government, there could have been no pretense for declaring them unconstitutional in state legislation.

“A property tax for the general purposes of the government either of the state at large, or of a county, city, or other district, is regarded as a just and equitable tax. The reason is obvious. It apportions the burden according to the benefit more nearly than any other inflexible rule of general taxation. A rich man derives more benefit from taxation, in the protection and improvement of his property, than a poor man, and ought therefore to pay more. But the amount of each man's benefit in general taxation cannot be ascertained and estimated with any degree of certainty, and for that reason a property tax is adopted instead of an estimate of benefits. In local taxation, however, for special purposes, the local benefits may, in many cases, be seen, traced, and estimated to a reasonable certainty. At least this has been supposed and assumed to be true by the legislature, whose duty it is to prescribe the rules on which taxation is to be apportioned; and whose determination of this matter, being within the scope of its lawful power, is conclusive.”¹

¹ *Ruggles, J., in People v. Brooklyn*, 4 N. Y. 419, 427.

It is safe to assume, as the result of the cases, that the constitutional provisions refer solely to state taxation, or when they go further, to the general taxation for state,¹ county, and municipal purposes; and though assessments are laid under the taxing power, and are in a certain sense taxes, yet that they are a peculiar class of taxes, and not within the meaning of that term as it is usually employed in our constitutions and statutes.² They may therefore be laid on property specially bene-

¹ A charter provision for taxing to abutting owners the cost of street paving does not violate a constitutional provision that the legislature shall not levy taxes except to defray expenses of government. That provision does not refer to any action by the legislature which would confer such authority upon a municipality: *Storrie v. Houston St. R. Co.*, 92 Tex. 129.

² On this point see *Birmingham v. Klein*, 89 Ala. 461; *Holley v. Orange County*, 106 Cal. 420; *Nichols v. Bridgeport*, 23 Conn. 189; *Augusta v. Murphey*, 79 Ga. 101; *Murphy v. People*, 120 Ill. 234; *Dempster v. Chicago*, 175 Ill. 278; *Gilson v. Board of Com'rs*, 128 Ind. 65; *Board of Com'rs v. Harrell*, 147 Ind. 500; *Fairfield v. Ratcliffe*, 20 Iowa 396; *Barnes v. Atchison*, 2 Kan. 454; *Lexington v. McQuillan's Heirs*, 9 Dana 513; *Gosnell v. Louisville*, 104 Ky. 201; *Delker v. Owensboro (Ky.)*, 61 S. W. Rep. 362; *Municipality v. White*, 9 La. An. 446; *Cummings v. Police Jury*, 9 La. An. 503; *Richardson v. Morgan*, 16 La. An. 429; *Matter of Opening of Streets*, 20 La. An. 497; *Barber Asphalt Paving Co. v. Gogreve*, 41 La. An. 251; *Board of Com'rs v. Mialeghvich*, 52 La. An. 1292; *Alexander v. Baltimore*, 5 Gill 393, 397; *Baltimore v. Cemetery Co.*, 7 Md. 517; *Jones v. Boston*, 104 Mass. 461; *Woodbridge v. Detroit*, 8 Mich. 274; *Vasser v. George*, 47 Miss. 713; *St. Joseph v. Anthony*, 30 Mo. 537; *St. Joseph v. O'Donoghue*, 31 Mo. 345; *Adams v. Lindell*, 72 Mo. 198; *Farrar v. St. Louis*, 80 Mo. 379; *St. Joseph v.*

Owen, 110 Mo. 445; *Clinton v. Henry Co.*, 115 Mo. 557; *Lamar W. & E. L. Co. v. Lamar*, 128 Mo. 188; *Kansas City v. Bacon*, 147 Mo. 259; *State v. Dean*, 23 N. J. L. 835; *State v. Jersey City*, 24 N. J. L. 662; *Matter of Mayor, etc., of New York*, 11 Johns. 77; *Sharp v. Speir*, 4 Hill 76; *Livingston v. New York*, 8 Wend. 85; *Matter of Furman St.*, 17 Wend. 649; *Cain v. Commissioners*, 86 N. C. 8; *Raleigh v. Peace*, 110 N. C. 32; *Maloy v. Marietta*, 11 Ohio St. 636; *Lima v. Cemetery Assoc.*, 42 Ohio St. 128; *Raymond v. Cleveland*, 43 Ohio St. 522; *Guthrie v. Territory*, 1 Okl. 188; *Northern Liberties v. St. John's Church*, 13 Pa. St. 107; *Schenley v. Allegheny City*, 25 Pa. St. 128; *Wray v. Pittsburg*, 46 Pa. St. 365; *Hammett v. Philadelphia*, 66 Pa. St. 146; *Mt. Pleasant v. Baltimore & O. R. Co.*, 138 Pa. St. 365; *Beaumont v. Wilkes Barre*, 142 Pa. St. 198; *McMillan v. Tacoma (Wash.)*, 67 Pac. Rep. 68; *Hale v. Kenosha*, 29 Wis. 599; *Heller v. Milwaukee*, 96 Wis. 134; *McCord v. Bell (Wis.)*, 87 N. W. Rep. 478. It was held in *State v. Judges*, 46 La. An. 1292, that local assessments for building and maintaining levees, though levied without reference to the rule of uniformity, or to the limitations applicable to general taxation, are none the less "taxes" within the purview of a constitutional provision giving the supreme court appellate jurisdiction in cases involving "the construction or legality of any toll, impost, or tax." A lessee's covenant to pay the water tax and half of all other taxes

fited, notwithstanding such constitutional restrictions as have been mentioned.¹

5. The methods of apportionment. Sufficient, perhaps, has been said regarding the principles on which special assessments are levied.² The methods which are chosen for giving those principles effect may now receive brief attention.

levied on the property does not include assessments for street and sidewalk improvements: *De Clercq v. Barber Asphalt Paving Co.*, 167 Ill. 215. A mining lease requiring the lessee to pay taxes, duties, and imposts on coal mined, the mining improvements, and the surface and coal land itself, does not require him to pay municipal assessments for paving a street or constructing a sewer: *Pettibone v. Smith*, 150 Pa. St. 118. Assessments for sewers and curbing are not taxes within the meaning of a devise requiring the life-tenant to "pay all necessary taxes on the property": *Chambers v. Chambers*, 20 R. I. 370. So the word "taxes," as used in a devise of property to one's wife, remainder over, provided she should pay all taxes assessed against the property during her life-time, does not include a paving assessment for a permanent improvement: *Chamberlin v. Gleason*, 163 N. Y. 214. In an agreement to convey "a good title 'to certain land' free and clear from all mortgage encumbrances, taxes, and mechanics' liens," the word "taxes" includes a sewer assessment: *Williams v. Monk*, 179 Mass. 22. An agreement to pay "all taxes and assessments," held to embrace street assessments: *Oswald v. Gilbert*, 11 Johns. 443; *Codman v. Johnson*, 104 Mass. 491. One who buys land subject to assessments which by his deed he agrees to pay may nevertheless contest them: *State v. Jersey City*, 35 N. J. L. 381.

¹ *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151.

² In *Alexander v. Baltimore*, 5 Gill 388, the general principle underlying these assessments is justly said to be the same as that on which highway taxes are laid. In *Bridgeport v. New York & N. H. R. Co.*, 36 Conn. 255, 262, *Butler, J.*, in considering the question whether a certain act subjecting railroad property to a general tax, and exempting it from all other taxes, would exempt it from special assessments, makes the following remarks: "It is doubtless true that such an assessment of benefits is an exercise of the taxing power, and in a general sense a tax. It was so regarded by this court in *Nichols v. Bridgeport*, 23 Conn. 207, to which we have been referred. But it is never spoken of in the charters of cities and boroughs, or in the general law, or in popular intercourse, as a tax. And although this strictly in a general sense is a tax, it is one of a peculiar nature. It is a *local* assessment imposed occasionally as required upon a limited class of persons interested in a *local* improvement, and who are assumed to be benefited by the improvement to the extent of the assessment, and it is imposed and collected as an *equivalent* for that *benefit* and to pay for the improvement. It has consequently never been regarded as a tax, or termed such in legislative proceedings, in our public or private laws, or in popular intercourse. In all these it is known only and dis-

Although complaint is often made that special assessment operates oppressively and unjustly, and it cannot be denied that in individual cases the complaint is perfectly just, yet on the whole it has a decided advantage over other taxation in the fact that its methods are so flexible and so easily adapted to the special equity and justice of the several classes of cases. This is shown in the modes of apportionment which are selected under different circumstances.

1. The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited.

2. The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.¹

tinctively as 'an assessment for benefits,' and it cannot safely be assumed that the legislature had such assessment in contemplation when they passed the act of 1864." A statute directing street commissioners to determine annually the just and equitable sewer charges to be paid by estates in the city, and to take into consideration not only the benefits received by the estate, but also "such other matters as they shall deem just and proper," is unconstitutional as authorizing a taking of property to pay a charge not founded on a special benefit or equivalent received by the estate or its owner: *Sears v. Street Com'rs*, 173 Mass. 350. "Property can only be assessed for public improvements on the principle of benefits received by the property from the construction of the work, and the assessment should never exceed the benefit conferred; and it is essential that it shall appear from the proceedings themselves that such was the principle on which the assessment was made." There must be some finding that the benefits will equal the amount levied: *Crawford v. People*, 82 Ill. 577.

¹ See *Spencer v. Merchant*, 125 U.

S. 345; *Walston v. Nevin*, 128 U. S. 578; *Lent v. Tillson*, 140 U. S. 316; *Illinois Central R. Co. v. Decatur*, 147 U. S. 190; *Paulsen v. Portland*, 149 U. S. 30; *Bauman v. Ross*, 167 U. S. 548; *Webster v. Fargo*, 181 U. S. 394; *Wight v. Davidson*, 181 U. S. 371; *People v. Sherman*, 83 Ill. 165; *Birket v. Peoria*, 185 Ill. 369; *State v. Brill*, 58 Minn. 152. A statute authorizing a city to assess against the abutting property two-thirds of the expense of paving a street, and the whole expense of constructing a sewer, held valid: *Parkersburg v. Tavenner*, 42 W. Va. 486. When commissioners are authorized to assess such part of the expense upon a city, and such part locally as they shall deem just, they are not obliged to assess any upon the city unless they deem it just to do so: *People v. Syracuse*, 63 N. Y. 291. The legislature is not bound to apportion a local improvement tax upon all the taxable property in a city, but it may place the burden upon the owners of lands in proportion to special benefits received beyond the general advantage, and the benefits may be estimated by the municipal authorities in the first instance if an appeal

3. The whole cost in other cases is levied on lands in the immediate vicinity of the work.¹

In a constitutional point of view any of these methods is admissible, and one may be sometimes just, and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever.² The question is legislative, and, like all legislative

to a jury is allowed to one aggrieved. If only half the benefit beyond the general advantage to all the real estate in the city is assessed to the property held by the council to be specially benefited, and the rule of apportionment is uniform within the district benefited, the assessment is proportionable and reasonable within the constitutional rule: *Holt v. Somerville*, 127 Mass. 408. See *Hayden v. Atlanta*, 70 Ga. 817. The apportionment of the cost of construction of a great public sewer on the basis of the value of the real and personal property benefited by the sewerage system, and the cost of operation on the basis of the population of the area benefited, sustained; the system being a public improvement for the general benefit of the district in view of its present and future needs: *In re Kingman*, 170 Mass. 111. As the legislature cannot fix an arbitrary percentage of the cost of a public improvement to be imposed upon a local assessment district without regard to the benefits received, an act requiring at least half of the amount awarded as compensation to be assessed upon the district fixed by the common council, is invalid: *Detroit v. Recorder's Court*, 112 Mich. 588. Assessments for improvements are not invalidated by the city's agreeing to assume assessments if the owners affected will release claims for damages: *Towne v. Newton City Council*, 169 Mass. 240. Under the legislation in Illinois prior to 1897 the

court had no power to change the distribution, made by or under the provisions of the ordinance, of the cost of the improvement between the public and the property assessed: *Billings v. Chicago*, 167 Ill. 337, and cases cited. Where an ordinance excepts abutting owners from liability for graveling so much of the street as is "occupied by the public grounds owned by the city," the city was held to "own" land dedicated for park purposes, though it might not have the fee-simple title thereto: *Bennett v. Seibert*, 10 Ind. App. 369.

¹ An ordinance imposing the whole cost of an improvement on the contiguous property without any previous inquiry whether there is any property that would be benefited to that extent is not void where, under the statute, the council's determination in such ordinance is not final but is subject to review by the county court which can make, in the proceedings for the confirmation of the assessment, a proper distribution between the city and the property: *Graham v. Chicago*, 187 Ill. 400; *Midgaugh v. Chicago*, 187 Ill. 230.

² As to the diverse methods, see *English v. Wilmington*, 2 Marvel 63; *Wallace v. Shelton*, 14 La. An. 498. A city cannot combine general taxation, special taxation, and special assessment in making a single improvement: *Kuehner v. Freeport*, 143 Ill. 92. The borrowing of money by the city to pay land damages is not necessarily an election to pay for improve-

questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule.¹

Assessment by benefits. Even after it has been determined how the cost shall be borne, as between the public and the estates benefited, much liberty is allowed in fixing upon the basis of apportionment as between individuals.² The two methods between which a choice is commonly made are:

1. An assessment made by assessors or commissioners, appointed for the purpose under legislative authority, and who are to view the estates, and levy the expense in proportion to the benefits which in their opinion the estates respectively will receive from the work proposed.

2. An assessment by some definite standard fixed upon by the legislature itself, and which is applied to estates by a measurement of length, quantity, or value.³

An assessment by the first method would seem to be most equal and just, because it would be made on actual examination of the lands assessed. The legislature, in such cases, makes the rule, and the proper officers give effect to it in a manner

ments by a public tax and not by a local assessment: *Heiser v. New York*, 104 N. Y. 68. The term "special improvements" in a city ordinance providing for the same does not of itself import that the owners of abutting property shall bear the expense thereof: *Greenville v. Harvie* (Miss.), 31 South. Rep. 425.

¹ *Parsons v. District of Columbia*, 170 U. S. 45, 55; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324. General taxation implies a distribution of the burden upon some general rule of equality. So a local assessment, or tax for a local benefit, should be distributed among and imposed upon all equally, standing in like relation: "*Redfield, J.*, in *Allen v. Drew*, 44 Vt. 174, 186. The question is, or should be, what is equal under the circumstances. The benefits must be im-

posed on the property proportionately: *Crawford v. People*, 82 Ill. 577. As to necessity for proximate equality, see *Preston v. Roberts*, 12 Bush 570.

² The rule of apportionment among the parcels of land benefited rests in the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners: *Bauman v. Ross*, 167 U. S. 548, and cases there cited. And see *Gilson v. Board of Com'rs*, 128 Ind. 65; *Board of Com'rs v. Harrell*, 147 Ind. 500.

³ See *Mattingly v. District of Columbia*, 97 U. S. 687; *Gilson v. Board of Com'rs*, 128 Ind. 65; *Board of Com'rs v. Harrell*, 147 Ind. 500.

corresponding to the ordinary assessment for a taxation by values. The right thus to assess by benefits has been often affirmed, and can no longer be regarded as a controverted question.¹

When benefits are assessed after this method, the district within which the tax shall be laid may be determined in either of two modes:

1. The legislative authority, either of the state, or, when, properly authorized, of the municipality, may determine over

¹ Ahern v. Board of Improvement, 69 Ark. 68; Burnett v. Sacramento, 12 Cal. 76; Emery v. Gas Co., 28 Cal. 345; Nichols v. Bridgeport, 23 Conn. 189; Cone v. Hartford, 28 Conn. 363; Chicago v. Larned, 34 Ill. 203; Ottawa v. Spencer, 40 Ill. 211; Chicago v. Baer, 41 Ill. 306; Lafayette v. Fowler, 34 Ind. 140; Simpson v. Kansas City, 46 Kan. 438; Bradley v. McAtee, 7 Bush 667; Howell v. Bristol, 8 Bush 493; Morrison v. Her-shire, 32 Iowa 271; Alexander v. Baltimore, 5 Gill 383; Moale v. Baltimore, 5 Md. 314; Baltimore v. Cemetery Co., 7 Md. 517; Howard v. The Church, 18 Md. 314; Zion Church v. Baltimore, 71 Md. 524; Wright v. Boston, 9 Cush. 233; Dorgan v. Boston, 12 Allen 223; Brewer v. Springfield, 97 Mass. 152; Jones v. Boston, 104 Mass. 461; Hoyt v. East Saginaw, 19 Mich. 39; Steckert v. East Saginaw, 22 Mich. 104; Brevoort v. Detroit, 24 Mich. 322; Garrett v. St. Louis, 25 Mo. 505; St. Joseph v. O'Donoghue, 31 Mo. 345; St. Louis v. Clemens, 36 Mo. 467; St. Louis v. Armstrong, 38 Mo. 29; Uhrig v. St. Louis, 44 Mo. 458; State v. Newark, 27 N. J. L. 155; State v. Fuller, 34 N. J. L. 227; Livingston v. New York, 8 Wend. 86; Matter of Twenty-sixth St., 12 Wend. 203; Owners of Ground v. Albany, 15 Wend. 374; Matter of Furman St., 17 Wend. 649; Matter of De Graw St., 18 Wend. 568; People v. Brooklyn, 4 N. Y. 419; Reid v. Toledo, 18 Ohio 161; Scoville v. Cleveland, 1 Ohio St. 126; Hill v. Higdon, 5 Ohio St. 243; Marion v. Epler, 5 Ohio St. 250; McMasters v. Commonwealth, 3 Watts 292; Fenelon's Petition, 7 Pa. St. 173; Hancock St. Extension, 18 Pa. St. 26; Schenley v. Commonwealth, 36 Pa. St. 29; Commonwealth v. Woods, 44 Pa. St. 113; Wray v. Pittsburgh, 46 Pa. St. 365; Greensburg v. Young, 53 Pa. St. 280; Allentown v. Henry, 73 Pa. St. 404; Weber v. Reinhard, 73 Pa. St. 373. In State v. Charleston, 12 Rich. 702, the right to assess by benefits was denied, the point receiving but little attention, and the cases to the contrary not being referred to. In Bauman v. Ross, 167 U. S. 548, certain statutory directions were held reasonably to imply that the assessment for the establishment of a highway should be proportional to the benefit, and not to the market value or any other test. It was decided in Brady v. Hayward, 114 Mich. 326, that a statute providing for the apportionment of the expense of constructing drains on the basis of the per cent. of benefits to accrue instead of in dollars and cents, is valid. A constitutional provision authorizing the legislature to confer upon municipalities "power to make local improvements by special assessment or special taxation of property benefited," limits such assessments to the property specially benefited, and to the amount of the benefits con-

what territory the benefits are so far diffused as to render it proper to make all lands contribute to the cost; or,

2. The assessors or commissioners who, under the law, are to make the assessment, may have the whole matter submitted to their judgment, to assess such lands as in their opinion are specially benefited, and as ought therefore to contribute to the cost of the work.

When the first method is adopted, the legislature exercises directly an undoubted and necessary power, which pertains to it in all matters of taxation; and which is inseparable from the power of apportionment. The whole subject of taxing districts belongs to the legislature; so much is unquestionable.¹ The authority may be exercised directly, or, in the case of local taxes, it may be left to local boards or bodies;² but in the lat-

ferred: *Smith v. Omaha*, 49 Neb. 883, and cases cited. That it is competent to assess for sewers by special benefits is unquestionable. See *Hungerford v. Hartford*, 39 Conn. 279; *Wolf v. Philadelphia*, 105 Pa. St. 25.

¹ See *ante*, ch. VII. "The class of lands to be assessed for the benefits from a public improvement such as the opening of a highway may be determined by the legislature itself, by defining a district or by other designation, or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited:" *Bauman v. Ross*, 167 U.S. 548, citing *Spencer v. Merchant*, 125 U.S. 345; *Shoemaker v. United States*, 147 U.S. 282; *Fallbrook Irrig. Dist. v. Bradley*, 164 U.S. 112; *Ulman v. Baltimore*, 165 U.S. 719. And see *Walston v. Nevin*, 128 U.S. 578; *Sinton v. Ashbury*, 41 Cal. 525; *Simpson v. Kansas City*, 46 Kan. 438; *Kelly v. Chadwick*, 104 La. 719; *Spencer v. Merchant*, 100 N.Y. 585. A statute providing for the assessment of street improvements "upon the property adjoining, and to be specially benefited by the improvement," merely

designates the property, and does not mean "provided it is benefited by the improvement:" *United States v. Edmunds*, 3 Mackey 142. The legislature may create, or may authorize a municipality to create, a local taxing district for improvement purposes, which shall include part only of the property within the municipality: *Adams v. Shelbyville*, 154 Ind. 467.

² *Piper's Appeal*, 32 Cal. 530; *Kelly v. Chadwick*, 104 La. 719. Assessors and not common council held authorized to fix district of assessment for river dredging: *People v. Buffalo*, 147 N.Y. 675. Where a city may construct sewers by districts or otherwise, when done by districts and at the expense of the property specially benefited, it is not essential that the districts shall be defined by ordinance; it is sufficient if the record of the tax-proceedings clearly shows the property specially taxed for the improvement: *Atchison v. Price*, 45 Kan. 296. Where the power to pass an ordinance for the construction of a sewer is given by statute, it is not necessary that a city should establish a drainage district for the sewer: *Maywood Co. v. May-*

ter case the determination will be by a body possessing for the purpose legislative power, and whose action must be as conclusive as if taken by the legislature itself. It has been repeatedly decided that the legislative act of assigning districts for special taxation on the basis of benefits cannot be attacked on the ground of error in judgment regarding the special benefits, and defeated by satisfying a court that no special and peculiar benefits are received. If the legislation has fixed the district, and laid the tax for the reason that, in the opinion of the legislative body, such district is peculiarly benefited, its action must in general be deemed conclusive.¹ No doubt there

wood, 140 Ill. 216. See *White v. Harris*, 103 Cal. 528.

¹ *Shaw v. Dennis*, 5 Gilm. 416; *Bigelow v. Chicago*, 90 Ill. 49; *Preston v. Rudd*, 84 Ky. 150; *Kelly v. Chadwick*, 104 La. 719; *Baltimore v. Hughes*, 1 Gill & J. 480, 493; *Powers v. Grand Rapids*, 98 Mich. 393; *Brown v. Saginaw*, 107 Mich. 643; *Macon v. Patty*, 57 Miss. 378; *St. Louis v. Oeters*, 36 Mo. 456; *Litchfield v. Vernon*, 41 N. Y. 123, 133; *People v. Lawrence*, 41 N. Y. 140; *Spencer v. Merchant*, 100 N. Y. 585; *Kelly v. Cleveland*, 34 Ohio St. 468; *King v. Portland*, 38 Or. 402; *Philadelphia v. Field*, 58 Pa. St. 320. The legislature may declare conclusively that only property within a local taxing district shall be specially assessed on account of local improvements within that district: *Adams v. Shelbyville*, 154 Ind. 467. Council's action in including property in an improvement district held conclusive of the fact that it is "adjoining the locality to be affected:" *Little Rock v. Katzenstein*, 52 Ark. 107. The benefit to abutting lands from the construction of a sidewalk, and the necessity and reasonableness of the improvement, are for the determination of the legislature, and will not be inquired into except in case of a manifest abuse of authority: *Speer v. Athens*, 85 Ga. 49. A statute providing that if a city coun-

cil believes that a part of the city in the vicinity of a proposed improvement will be benefited thereby, it may determine that the whole or any just proportion of the compensation awarded shall be assessed on the owners of the land deemed to be benefited, and that the council shall then, by resolution, fix the district benefited and specify the amount to be assessed, does not confer an arbitrary power upon the council, and is valid; and the fact that the council, by resolution, decided the improvement should be made, clearly shows it believes that the property assessed is benefited: *Beecher v. Detroit*, 92 Mich. 268. A city council held to have authority to decide conclusively upon the district for a local improvement, and whether the levy will exceed the benefits: *Rogers v. St. Paul*, 22 Minn. 494. The boundaries of a district specifically described in the statute to be taxed for a local improvement cannot be enlarged by construction: *Nehasane Park Assoc. v. Lloyd*, 167 N. Y. 431. The designation of a taxing district by its street frontage, where that method of assessment is to be followed, is a sufficient compliance with a charter requirement that the council, in cases of special assessments, "describe or designate the lots and premises or locality to be assessed:" *Kalamazoo*

may be exceptions; and one of these would be a case in which, under pretense of apportionment, a work of general benefit had been treated as a work of merely local consequence, and the cost imposed on some local community in disregard of the general rules which control legislation in matters of taxation.¹ Another is where, under pretense of apportionment, a basis has been fixed upon which cannot possibly, as regards the particular work to be constructed, be just; as where a statute assumed to confer upon a city the authority to levy sewer assessments upon any property supposed to be benefited in proportion to area, but not limiting the assessment to lots along or near the sewer, or to lots contiguous to each other, or even to such as received direct or peculiar benefits.² Had the assess-

v. *Francoise*, 115 Mich. 554. The common council has power to reconsider a resolution fixing an assessment district, and to enlarge the district by subsequent action: *Trowbridge v. Detroit*, 99 Mich. 443. A re-assessment district may be different from what it was at the time of the original assessment: *Cline v. Seattle*, 13 Wash. 444.

¹ *Baltimore v. Hughes*, 1 Gill & J. 480, 492, per *Buchanan*, Ch. J.; *In re Washington Av.*, 69 Pa. St. 352. A jury empowered to assess for a street cannot arbitrarily select a part of the street for the purpose, except, perhaps, as it may limit it to abutters: *State v. St. Louis*, 1 Mo. 503. Where an assessment is to be laid "upon the lands" in a given levee district, the fact that some of the lands are to be benefited more than others will not warrant the entire omission from taxation of any land within the district: *Levee Dist. v. Huber*, 57 Cal. 41. Where several lateral sewers already constructed are intended to discharge into a main sewer proposed to be constructed so that the latter will benefit property drained by the lateral sewers, the cost of the main sewer may be assessed in proportion to benefits on such property as well as on that drained by it di-

rectly; and it is imposing an undue burden on the latter property to assess the whole cost against it: *State v. Union*, 53 N. J. L. 67. A special assessment for the purpose of improving a boulevard can be confined to property contiguous to the boulevard: *West Chicago Park Com'rs v. Farber*, 171 Ill. 146.

² *Thomas v. Gain*, 35 Mich. 155. Such an assessment, it was said, could under no circumstances be just "unless limited to lands directly and peculiarly benefited. But this act makes no provision by which parties assessed may of right drain into the sewer, so as to be enabled to reap the benefits they ought to derive from the expenditure. It makes no distinction between property actually occupied, or capable of being occupied, for city purposes, and that of an agricultural nature, of which there must be some within the city limits, upon which such a burden would fall with great severity and injustice. Nor does it confine the assessment to lands upon the street in which the sewer is laid; and in the assessment before us lots on a parallel street are assessed. These lots, it is to be assumed, will be assessed again if a sewer is constructed in the street on which they front, and

ment been restricted to the adjacent lots, there might, perhaps, have been no difficulty in sustaining it, as has been done in some cases.¹ A statute authorizing commissioners to assess the cost of a sewer on lands benefited thereby in such proportion "as they shall deem just and equitable" has been held invalid as failing to lay down any definite rule of apportionment.²

there is nothing in the act or in the nature of things to prevent a lot being assessed several times in different districts, as often as a sewer is constructed which, in the opinion of the common council, is productive of benefit to the neighborhood. This might not be unjust if each assessment was laid upon an estimate of actual benefits; but when it is levied by an arbitrary standard which requires the burden to be laid upon lands far from the sewer and only slightly benefited, equally with those fronting upon it and greatly benefited, it is manifest that it must not only work injustice, but that in some cases it may amount to actual confiscation. It is not, therefore, legally possible that such an apportionment of the cost of sewers can be just or equal, or in proportion to benefits." See, for a similar case, *Kennedy v. Troy*, 14 Hun 308. And for a like principle, *Preston v. Roberts*, 12 Bush 570. In the celebrated case of *Norwood v. Baker*, 172 U. S. 269, the action of a municipality in condemning land for a street through the property of a single owner, and then assessing on his abutting property all the damages awarded, together with the costs and expenses of the condemnation proceedings, was held to be illegal. In *Rolph v. Fargo*, 7 N. D. 640, the court says: "It is admitted . . . that the legislature may prescribe the rule for the apportionment of benefits, but it is not conceded that the power in this regard is unlimited. The rule must, at least, be one which it is legally possible may be just and equal

as between the parties assessed. If it is not conceivable that the rule prescribed is one which will apportion the burden justly, or with such proximate justice as is usually applicable in tax cases, it must fall to the ground like any other arbitrary action which is supported by no principle." The method of ascertaining the area of benefit of a local improvement which results in arbitrarily dividing some lots, used or held as one plot of ground, so as to assess only the part lying within the area, is illegal: *Aldridge v. Board*, 51 N. J. L. 170; *Coward v. North Plainfield*, 63 N. J. L. 61.

¹See *Grinnell v. Des Moines*, 57 Iowa 144; *Gillette v. Denver*, 21 Fed. Rep. 822. Under the Iowa statute an assessment for a street improvement was held to be limited to lots actually abutting on the street according to the platted boundary lines: *Smith v. Des Moines*, 106 Iowa 590.

²*New Brunswick Rubber Co. v. Commissioners*, 38 N. J. L. 190. This was followed in *Barnes v. Dyer*, 56 Vt. 469, where a sidewalk assessment came in question. The common council was empowered by statute to assess upon the owners of abutting property so much of the expense as they should deem just and equitable. *Veazey, J.*, said: "The only question here is whether the phrase, 'as they shall deem just and equitable,' is sufficiently certain as a standard of assessment. If it could be properly construed as meaning only what was just and equitable in view of the benefit to the premises

The legislative authority in respect to assessment districts is sometimes exercised by making several districts for a single work. This indeed is often done in the case of street improvements; it being equally within the power of the legislature to prescribe one district over which the whole cost of the improvement shall be spread, or to make separate districts for the improvement along the several blocks.¹ It has even been held that the improvement of several streets may be treated as one work for the purposes of a special assessment, and the whole cost apportioned by uniform rule throughout one district,² and

fronting on the improved sidewalk, it would possibly be sufficient. The exceptions do not state upon what view or theory the assessment in question was made. If said clause is fairly liable to a different construction from the one above stated, then it furnishes no certain legal standard of assessment. Did the court or common council determine the amount of this assessment in view of the benefit to the abutting land, or of its value, or of the personal convenience to the defendant, or of the ability of the defendant to pay, or of all of these combined? Who can say? Why might they not under this clause assess one man in one view, and another in another view? Just and equitable in respect to what? The words import no special limitation." See, also, *Whiteford v. Probate Judge*, 53 Mich. 130.

¹ *Lightner v. Peoria*, 150 Ill. 80; *Brevoort v. Detroit*, 24 Mich. 322; *Scoville v. Cleveland*, 1 Ohio St. 126; *Creighton v. Scott*, 14 Ohio St. 438; *Schenley v. Commonwealth*, 36 Pa. St. 29. A statute may make each street or part of a street a taxing district for the improvement thereof: *Hilliard v. Asheville*, 118 N. C. 845. The legislature may impose upon one district a part of the cost of a local improvement, and the rest upon another district: *Spencer v. Merchant*, 100 N. Y. 585. Where the rule of apportionment prescribed by the legis-

lature makes the whole distance on the street to be improved the taxing district, an assessment made upon each block separately as a taxing district is void: *Simpson v. Kansas City*, 46 Kan. 438. Where a street is of different widths, it may, in proceeding to improve it, be divided into as many sections as there are different widths, and the property on each section be assessed for the cost thereof: *Findley v. Frey*, 51 Ohio St. 390. Where unconnected sections of a street were opened it was held in New York that such sections were separate streets, the cost of each chargeable on the property benefited: *In re 167th St.*, 68 Hun 158, 22 N. Y. Supp. 604. Under a power to improve any street or any portion of the width of any street, a street may be divided into sections, and one improved with a double and the other with a single paved track, and the lots abutting on each section may be assessed separately for the improvement of that section: *Bacon v. Savannah*, 86 Ga. 301.

² See *ante*, p. 236. Single streets may be deemed parts of one improvement: *Springfield v. Green*, 120 Ill. 269. As to when ordinances will be regarded as providing for but a single improvement, see *ibid.*; *Ligare v. Chicago*, 139 Ill. 46; *Kerfoot v. Chicago*, 195 Ill. 229. Filling, grading, and bridging on one street, and the grading of other streets connected

this may perhaps be equally competent with the general assessment throughout a city of the cost of such improvements. In

therewith, may be considered "one entire improvement," for which a local assessment may be made: *State v. District Court*, 33 Minn. 295. In *Arnold v. Cambridge*, 106 Mass. 352, the expense of constructing sidewalks on two streets was levied by one assessment, and apportioned among the lots abutting on the two streets. The only authority under which this could be done was the statute which empowered the mayor and aldermen, whenever they should deem it expedient to construct sidewalks "in any street," to assess the expense on the abutters in just proportions. By this the court thought "it was evidently intended by the legislature that the case of each street should be considered separately, and with a view to its own special circumstances;" and that, consequently, "the power to treat two sidewalks in two distinct streets as one for the purposes of assessment [was] not given by the statute." Compare *Hager v. Burlington*, 42 Iowa 661. In England it is held that separate lines of sewers ought not to be included in one district, when they are on a different level, and no one is of benefit to the district drained by the other: *Rex v. Tower Hamlets*, 9 B. & C. 517. For a very peculiar case in which the case of *Arnold v. Cambridge* was held not applicable, see *Cuming v. Grand Rapids*, 46 Mich. 150. An assessment for a sewer is not invalid because of the sewer's being constructed along more than one street, if the improvement is a unity: *Grimmell v. Des Moines*, 57 Iowa 144; *Kendig v. Knight*, 60 Iowa 29. A city council may declare an entire sewer, with branches, a main sewer, and assess as for a single sewer; and, having decided as to the necessity

for a sewer of that kind, its judgment, except in extreme cases, is final: *Oil City v. Oil City Boiler Works*, 152 Pa. St. 348. As to when two sewers may be provided for by one assessment, see *Matter of Ingraham*, 64 N. Y. 310. It is not competent to assess for two separate and distinct public improvements as an entirety, and assess the cost together, unless the statute provides therefor or there are special reasons making it proper: *Mayall v. St. Paul*, 30 Minn. 294. For a proper case see *Stoddard v. Johnson*, 75 Ind. 20. The fact that a sewer constructed in one district or part of the city connects with, or is an extension of, another already constructed, does not make the territory drained by both a single and distinct district; nor does it require that all the property within that territory shall be assessed for the sewer last constructed; but when a section is built or extension made, only the territory drained and specially benefited by the construction of such section or extension can be assessed for its cost: *Atchison v. Price*, 45 Kan. 296. Where a single ordinance provides for the paving of three streets of different widths, and the commissioners make a separate estimate for each street according to its width, properties abutting on the different streets should not be assessed at the same rate per front foot, but in proportion to the width of the respective streets: *Haley v. Alton*, 152 Ill. 113. Though an ordinance provides for the improvement of two streets, the cost of improving one cannot be assessed upon both: *Connersville v. Merrill*, 14 Ind. App. 303; *Willard v. Albertson*, 23 Ind. App. 162, 164.

the margin reference is made to certain cases which have arisen under the laws of the different states with reference to assessment districts.¹

¹ Under the California statute providing that the cost of grading streets should be assessed against the lots fronting them, the total cost should not be assessed against the property fronting on one side of the street: *San Diego Inv. Co. v. Shaw*, 129 Cal. 273. A street having been ordered to be paved for one block where not already so paved, the assessment was properly made on those lots only on which the work done abutted: *McDonald v. Caniff*, 99 Cal. 386. Under an act providing that assessments for improving a street should be levied on the property "adjoining," it was held that lots could not be said to adjoin an avenue which, if extended through a public square that faced the lots, would touch at one corner only the block in which the lots were situated: *Johnson v. District of Columbia*, 6 Mackey 21. Under the Illinois statute authorizing city councils "to make local improvements by special assessment, or by special taxation, or both, of contiguous property, or general taxation or otherwise," a special assessment may be levied on property benefited by a proposed local improvement, though such property is not contiguous to the improvement: *Guild v. Chicago*, 82 Ill. 472; *Louisville & N. R. Co. v. East St. Louis*, 134 Ill. 656. Where only the east 158 feet of a forty-acre tract is benefited by a local improvement, the benefit may be assessed on that part instead of on the entire tract: *Barber v. Chicago*, 152 Ill. 37, distinguishing *Warren v. Chicago*, 118 Ill. 329, and *Cram v. Chicago*, 139 Ill. 265. See *Ryan v. Sumner*, 17 Wash. 228. Where a city ordinance provides that the cost of improving and paving certain streets shall be

assessed on the abutting lots, corner lots whose sides are bounded on a street so improved are assessable as abutting on such street: *Springfield v. Green*, 120 Ill. 269; *Wilbur v. Springfield*, 123 Ill. 393. In opening a street land lying contiguous thereto but at one end of it is subject to special assessment: *Brooks v. Chicago*, 168 Ill. 60. Where a special tax is levied for improving a street the municipality cannot be assessed for the benefit done to cross-streets, since they are not "contiguous" property: *Walters v. Lake*, 129 Ill. 23; *Holt v. East St. Louis*, 150 Ill. 530; *Cunningham v. Peoria*, 157 Ill. 499. Non-abutting property cannot be assessed for a sewer unless there is a provision for draining the district in which it is located into the sewer, or the property owner is assured that he will in some way be entitled to the benefits of the sewer: *Edwards v. Chicago*, 140 Ill. 440; *Title Guaranty, etc. Co. v. Chicago*, 162 Ill. 505; *Gray v. Cicero*, 177 Ill. 459; *Mason v. Chicago*, 178 Ill. 499; *Bickerdike v. Chicago*, 185 Ill. 280. In Indiana it is competent to provide that the district for a street improvement shall include the land within a certain distance of it, whether fronting on the street or not: *Ray v. Jeffersonville*, 90 Ind. 567. As to how far back from the improved street the assessment in that state may extend, and as to the primary liability of the lot abutting on such street, see *Frankfort v. State*, 128 Ind. 438; *Terre Haute v. Mack*, 139 Ind. 99; *Woodruff Place v. Raschig*, 147 Ind. 517. If the statute provides that where a street is improved one-half of the cost of the intersections of an alley with the street shall be

Where the legislature prescribes no limits to the taxing district, but authorizes an assessment on such property as shall appear to be benefited, the report of the assessors or commis-

sioners apportioned on the lots abutting on the alley to the line of the first street parallel with the street under improvement, which is intersected by the alley, the fact that there is another alley, twenty feet wide, which is parallel with such street, does not place the lot out of the assessment district: *Praigg v. Western & P. Supply Co.*, 143 Ind. 358. It was held in an Iowa case that where provision is made that the tax shall be assessed on the land "fronting on the highway" to be improved, this means only that part of the highway which is to be improved: *Kendig v. Knight*, 60 Iowa 29. In a case where that part of the lot which abutted on the improvement was owned by one person, while the rest of the lot was owned by another, it was decided that there was no authority to inquire how far back from the street the rights of abutters extended: *Amery v. Keokuk*, 72 Iowa 701. Under a charter conferring on a city power to pave its streets, and to require of owners of adjacent lots to pave one-half in width of the street contiguous to their respective lots, the owners of lots on each side of the street are required to pay for one-half of the paving, whether the paving covers a part only or the full width of the street, and whether the paving is in the center of the street or on one side only; and where the paving is on one side only, the adjacent owner on that side is only liable for one-half of the expense: *Muscatine v. Chicago, R. I. & P. R. Co.*, 88 Iowa 291. See, to the same effect, *Indianapolis & U. R. Co. v. Capitol Paving, etc. Co.*, 24 Ind. App. 114. As to the district for paving and curbing a street in Kansas, and

as to what constitutes a "block" in that state, see *Blair v. Atchison*, 40 Kan. 353; *Olson v. Topeka*, 42 Kan. 709; *Parker v. Atchison*, 48 Kan. 574; *McGrew v. Kansas City (Kan.)*, 67 Pac. Rep. 438. As to the proper districts for improving streets or alleys under city charters in Kentucky, see *Caldwell v. Rupert*, 10 Bush 179; *Craycraft v. Selvage*, 10 Bush 696; *Schmelz v. Giles*, 12 Bush 491; *Joyes v. Seyburn (Ky.)*, 13 S. W. Rep. 361; *Stengel v. Preston*, 89 Ky. 616; *Cooper v. Nevin*, 90 Ky. 85; *Boone v. Nevin (Ky.)*, 23 S. W. Rep. 512; *Washle v. Nehan*, 97 Ky. 351; *Dumesnil v. Shanks*, 97 Ky. 354; *McHenry v. Selvage*, 99 Ky. 232; *Dumesnil v. Gleason*, 99 Ky. 652; *Sheafer v. Selvage (Ky.)*, 41 S. W. Rep. 569; *Louisville v. Selvage (Ky.)*, 51 S. W. Rep. 447. In assessing property for the construction of a street, the city council was held to have no power, in determining the depth to be assessed, to cross another principal street and lay the burden on property fronting that street: *Fidelity Trust, etc. Co. v. Voris's Ex'rs (Ky.)*, 61 S. W. Rep. 474. An ordinance for the original construction of a street may, in designating the property to be assessed, define it as extending on each side half way back to the next street, though a much greater depth will thus be assessed on one side than on the other: *Sheafer v. Selvage (Ky.)*, 41 S. W. Rep. 569. Under the Massachusetts statutes, where a common sewer is intended not only to serve as an outlet for other common sewers, but also to benefit lands abutting on it, no part of the cost need be assessed on the owners of lands along the line of tributary sewers: *Ayer v. Somerville*, 143 Mass. 585.

sioners can alone determine what the district shall be. The subject is referred to them as a matter depending on judgment, after actual inspection; but as they only pass upon the ques-

The Michigan statute allows lots not abutting on a street under improvement to be included in the assessment district if they are benefited: *Powers v. Grand Rapids*, 98 Mich. 393; *Goodrich v. Detroit*, 123 Mich. 559. Under the charter provision in St. Louis, limiting the power to assess "adjoining property" for street improvements, "calculating a depth to such property of 150 feet, to seventy-five per cent. of its value, a tract of land bordering on the improved street, and running back from it to a depth of sixty feet, is assessable when used by the owner as an entirety, although formed of two lots only one of which abuts on such street: *Wolfort v. St. Louis*, 115 Mo. 139. In establishing an alley which continued an older one that extended partly through a block, all the owners of property abutting on the entire completed alley in that block were held liable to assessment for benefits: *St. Louis v. Lane*, 110 Mo. 254. It is held in Nebraska that to pay for extending a street a tax may be levied on all the specially benefited property which abuts on the street, and not merely on the property abutting on or adjacent to the extended part of it: *McCormick v. Omaha*, 37 Neb. 829. "While the improvement and paving of an alley is a special benefit to the lots abutting thereon, it does not follow that portions of lots somewhat remote from the alley do not also receive benefits from the improvement. As originally laid out, lots extend from the street to the alley, and necessarily one-half the cost of paving the alley opposite each lot is assessed upon the lot. If the lot is subdivided, the cost is still to

be borne by the lot. the mode of apportionment to be based upon some rule that will do justice to the several owners:" *Lansing v. Lincoln*, 32 Neb. 457. In New Jersey it is held that if, in the judgment of the assessors, the special benefits of a public improvement extend at all to a lot of land which a reasonable owner would use or offer for sale only as an entirety, they should levy the assessment on the whole lot, and not merely on such part of the lot as lies within lines previously fixed by them as the limit of assessable benefits: *State v. Essex Pub. Road*, 51 N. J. L. 166. Where an abutting owner had improved at his own expense part of a street, which was accepted by the town authorities, his property abutting on such part was properly excluded from the assessment when the whole length of the street was ordered improved: *In re East Eighteenth St.*, 142 N. Y. 645. Under a city charter providing that the commissioners shall assess the damages for land taken on the land benefited by a street's extension, the assessment is not limited to the property bounded by the extended streets, but may be extended to other property which the commissioners may judge will be benefited: *In re Amsterdam*, 55 Hun 270. Under a statute providing that in case of the opening of any street, "where no building for which compensation can lawfully be made shall be taken, the assessment shall not extend beyond the center line of the lot adjacent thereto," property beyond such limit is only assessable for the value of the building when one is taken: *In re Board of Street Opening*, 64 Hun 59, 18 N. Y. Supp. 727.

tion of fact, the district is to be considered as prescribed by the legislature, when the principle is settled which is to determine it.¹ And when once prescribed under competent legislative authority, the levy must embrace all the property within the district to which the principle of the assessment is applicable. To omit any would be to defeat the rule of apportionment,² and

Where land not subdivided into lots is benefited by a street in front of it, it is fair to assess the front land to the depth of contiguous lots: *Parmelee v. Youngstown*, 43 Ohio St. 162. It is held in Pennsylvania that property which does not abut upon the line of a public improvement is not subject to an assessment for benefits, even where there is no approach to or exit from such property except by the use of said improvement: *In re Morewood Av.*, 159 Pa. St. 20; *In re Fifty-fourth St.*, 165 Pa. St. 8. In the same state it was decided that a claim of lien for paving a street bounding only one side of a square is properly filed where the property belongs to one person and is used as an entirety, there being no division lines across it: *Chester v. Eyre*, 181 Pa. St. 642.

¹ See *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112; *Latham v. Wilmette*, 168 Ill. 153; *Powers v. Grand Rapids*, 98 Mich. 393; *State v. Newark*, 48 N. J. L. 101, 49 N. J. L. 239; *King v. Portland*, 38 Or. 402. An assessment of benefits for the construction of a way may be erroneous if not laid upon estates liable thereto by reason of the adoption of a mistaken principle of law, but not by reason of a mistaken finding of fact that such estates were not specially benefited: *Lincoln v. Street Com'rs*, 176 Mass. 210. As to districts depending on the estimates of commissioners, see *Appeal of Powers*, 29 Mich. 504; *St. Louis v. Excelsior Brewing Co.*, 96 Mo. 677; *Matter of Ward*, 52 N. Y. 395; *In re Amsterdam*, 126 N. Y. 158; *Raymond v.*

Cleveland, 42 Ohio St. 522. That commissioners to lay out a benefit district may, after ascertaining such district, change it at any time before rendering their final report, see *St. Louis v. Brown*, 155 Mo. 545. In *State v. Otis*, 53 Minn. 318, it was held that a notice of the meeting of the board of public works of a city for the purpose of assessing upon property benefited the cost of a public improvement is void if in advance of any hearing it defines a limited district as embracing the property upon which the assessment is to be made. Where a city charter provided that the city council shall "determine and prescribe the limits within which private property shall be deemed benefited by" street improvements, that a jury shall assess the damages, and that after deducting therefrom the amount of the public benefit each lot or parcel shall be "assessed with an amount bearing the same ratio to such balance as the benefit to each lot or parcel bears to the whole benefit to all the private property assessed," all property within the limits is not to be assessed, but only those lots which the jury decides have been benefited: *Kansas City v. Baird*, 98 Mo. 215.

² *People v. Cole*, 128 Ill. 158; *Independence v. Gates*, 110 Mo. 374; *Thornton v. Clinton*, 148 Mo. 648; *In re Protestant Episcopal School*, 75 N. Y. 324; *Ellwood v. Rochester*, 122 N. Y. 229; *Savage v. Buffalo*, 131 N. Y. 568; *Masters v. Portland*, 24 Oreg. 161. See *Matter of Churchill*, 82 N. Y. 288. Where an assessment for the expense of constructing a

the legislature could not validate the assessment.¹ Nor, where an assessment has been levied under a statute requiring the assessors to assess all the lands benefited, can the legislature authorize a further assessment to be levied against other lands of the same owners, so long as the original assessment remains valid against those owners.²

Assessment by the foot front. In many instances where streets were to be opened or improved, sewers constructed, water pipes laid, or other improvements entered upon, the benefits of which might be expected to diffuse themselves along the line of the improvement in a degree bearing some proportion to the frontage, the legislature has deemed it right and proper to take the line of frontage as the most practicable and reasonable measure of probable benefits; and, making that the

sewer, made upon the basis that the property benefited should pay one-half of such expense, was declared invalid, a subsequent assessment on the basis of the benefited property's paying two-thirds of such expense, and exempting those who had fully paid their former assessments, is unequal and invalid: *White v. Stevens*, 67 Mich. 33. An assessment only on property "fronting, abutting, and adjacent to" a street does not necessarily show a failure to assess all the land benefited: *Hennesy v. Douglas County*, 99 Wis. 129. To the same effect, *Holdom v. Chicago*, 169 Ill. 109. In proceedings to assess the benefits of a park, the jury's verdict omitting property from the assessment as not benefited will not be disturbed: *Kansas City v. Bacon*, 157 Mo. 450. Commissioners should take into consideration all benefited property within the area of assessment; but their determination will not be disturbed for an omission of that duty if it clearly appears that the assessment upon the objecting parties could not have been varied or diminished had the duty been performed fully: *Davis v. Newark*, 54 N. J. L. 144. A city may lawfully

contract to pay the cost of paving a street in front of a lot so nearly valueless as to render an assessment thereon unavailing; and this will not affect the validity of assessments against abutting property for other parts of the work: *Ottumwa, etc. Co. v. Ainley*, 109 Iowa 386. It is no defense to an assessment for a sewer in one street that land benefited by a sewer in another street is not assessed, when the two sewers, though built at the same time, are separate improvements. Nor is it a defense that lands are not assessed from which a private drain leads into the sewer, if the connection is only under revocable license: *Fairbanks v. Fitchburg*, 132 Mass. 42. That several acres of land not included in the assessment district were subsequently drained into the sewer does not affect the rights of persons assessed for the sewer's construction: *Heman v. Allen*, 156 Mo. 534.

¹ *People v. Lynch*, 51 Cal. 15; *Brady v. King*, 53 Cal. 44; *People v. McCune*, 57 Cal. 153.

² *State v. Essex Pub. Board*, 51 N. J. L. 166.

standard, to apportion the benefits accordingly. Such a measure of apportionment seems at first blush to be perfectly arbitrary, and likely to operate in some cases with great injustice; but it cannot be denied that in the case of some improvements, frontage is a very reasonable measure of benefits; much more just than value could be; and perhaps approaching equality as nearly as any estimate of benefits made by the judgment of men. However this may be, the authorities are well united in the conclusion that frontage may lawfully be made the basis of apportionment.¹ Occasional hardships must inevitably re-

¹ *Parsons v. District of Columbia*, 170 U. S. 45; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324; *Tonawanda v. Lyon*, 181 U. S. 389; *Cass Farm Co. v. Detroit*, 181 U. S. 396; *Detroit v. Parker*, 181 U. S. 399; *City Council v. Birdsong*, 126 Ala. 632; *Chambers v. Satterlee*, 40 Cal. 497; *Whiting v. Quackenbush*, 54 Cal. 306; *Whiting v. Townsend*, 57 Cal. 515; *Jennings v. Le Breton*, 80 Cal. 8; *Diggins v. Hartshorne*, 108 Cal. 154; *Harney v. Benson*, 113 Cal. 314; *Hadley v. Dague*, 130 Cal. 207; *Banaz v. Smith*, 133 Cal. 102; *San Francisco Paving Co. v. Bates*, 134 Cal. 39; *English v. Wilmington*, 2 Marvel (Del.) 63; *Jones v. District of Columbia*, 3 D. C. App. 26; *Bacon v. Savannah*, 86 Ga. 301; *Savannah v. Weed*, 96 Ga. 570; *White v. People*, 94 Ill. 604; *Wilbur v. Springfield*, 123 Ill. 395; *Davis v. Litchfield*, 145 Ill. 313; *Chicago & N. A. R. Co. v. Joliet*, 153 Ill. 649; *Job v. Alton*, 189 Ill. 256; *Palmer v. Stumpf*, 29 Ind. 329; *Kirkland v. Board of Pub. Works*, 142 Ind. 123; *Adams v. Shelbyville*, 154 Ind. 467; *Allen v. Davenport*, 107 Iowa 90; *Hackworth v. Ottumwa*, 114 Iowa 467; *Barnes v. Atchison*, 2 Kan. 455; *Parker v. Challis*, 9 Kan. 155; *Covington v. Boyle*, 6 Bush 204; *Covington v. Worthington*, 88 Ky. 206; *Kelly v. Chadwick*, 104 La. An. 719; *Williams v. Detroit*, 2 Mich. 560; *Motz v. Detroit*, 18 Mich. 495; *Sheley v. Detroit*, 45 Mich. 431; *Kalamazoo v. Francoise*, 115 Mich. 554; *Cass Farm Co. v. De-* *troit*, 124 Mich. 433; *In re Norton*, 61 Minn. 542; *State v. Lewis Co.*, 72 Minn. 87; *State v. District Court*, 80 Minn. 293; *State v. Lewis Co.*, 82 Minn. 390; *St. Joseph v. Anthony*, 20 Mo. 537; *Fowler v. St. Joseph*, 37 Mo. 228; *Neenah v. Smith*, 50 Mo. 525; *Heman v. Allen*, 156 Mo. 534; *Kansas City v. Bacon*, 157 Mo. 450; *State v. Elizabeth*, 30 N. J. L. 365, 31 N. J. L. 547; *State v. Fuller*, 34 N. J. L. 227; *Raymond's Estate v. Rutherford*, 55 N. J. L. 441, 56 N. J. L. 340; *De Witt v. Elizabeth*, 56 N. J. L. 125; *Long Branch Police, etc. Com. v. Dobbins*, 61 N. J. L. 659; *Dooling v. Ocean City (N. J.)*, 50 Atl. Rep. 621; *O'Reilley v. Kingston*, 114 N. Y. 439; *Conde v. Schenectady*, 164 N. Y. 258; *People v. Pitt*, 169 N. Y. 521; *Stebbins v. Kay*, 51 Hun 589, 4 N. Y. Supp. 566; *Raleigh v. Peace*, 110 N. C. 32; *Hilliard v. Asheville*, 118 N. C. 845; *Rolph v. Fargo*, 7 N. D. 640; *Roberts v. First Nat. Bank*, 8 N. D. 504; *Webster v. Fargo*, 9 N. D. 208; *Ernst v. Kunkle*, 5 Ohio St. 520; *Upington v. Oviatt*, 24 Ohio St. 232; *Wilder v. Cincinnati*, 26 Ohio St. 284; *Wilson v. Salem*, 24 Or. 504; *Pennock v. Hoover*, 5 Rawle 291; *Spring Garden v. Wistar*, 18 Pa. St. 195; *McGonigle v. Alleghany City*, 44 Pa. St. 118; *Magee v. Commonwealth*, 46 Pa. St. 308; *Stroud v. Philadelphia*, 61 Pa. St. 255; *Beaumont v. Wilkes-Barre*, 142 Pa. St. 198; *Hand v. Fellows*, 148 Pa. St. 456; *Scranton v. Bush*, 160 Pa. St. 499; *McKeesport v. Busch*, 166 Pa. St. 628;

sult from the adoption of such a basis, but the question is fairly debatable whether they are likely to be more serious or more frequent than those which are to be anticipated from the selection of some other rule; and this question must be deemed

Scranton v. Koehler, 200 Pa. St. 126; Harrisburg v. McPherran, 200 Pa. St. 343; Cleveland v. Tripp, 13 R. I. 50; Winona & St. P. R. Co. v. Watertown, 1 S. D. 46; Tripp v. Yankton, 10 S. D. 516; Allen v. Drew, 44 Vt. 174; Davis v. Lynchburg, 84 Va. 861. As to the reasonableness and justice of an assessment by the foot front, compare the remarks of *Carpenter, J.*, in *Clapp v. Hartford*, 35 Conn. 66; *Read, J.*, in *Magee v. Commonwealth*, 46 Pa. St. 358; *Crozier, J.*, in *Hines v. Leavenworth*, 3 Kan. 186. An ordinance is not objectionable as giving no rules of apportionment of the assessment, where its terms are a declaration that the improvement shall be paid for according to frontage: *Cramer v. Charleston*, 176 Ill. 507. When assessment deemed to be on foot-front plan rather than in proportion to benefits or according to the value of property: *Cincinnati v. Batsche*, 52 Ohio St. 324. When on such plan it can be laid only on such lots as abut upon the improvement: *Ibid.* It was held in *Scott County v. Hinds*, 50 Minn. 204, that where a sidewalk is built in front of a part only of a city-lot owned by one person, the cost of construction is a proper charge against the entire tract. But see *Ryan v. Sumner*, 17 Wash. 228. Where an assessment by the front foot covers an entire lot, it will not be held objectionable because of the fact that a part of the lot, if assessed by itself, would be unjustly assessed: *Moale v. Baltimore*, 61 Md. 224. In assessing the cost of a street improvement on abutting property by the front foot, regard must be had as to what is the real front of the property; and if a lot abuts lengthwise on the improvement, but fronts breadthwise on another street, and not on the improvement, the lot should be regarded as fronting breadthwise on the improvement, and should be assessed for the number of feet on the improvement that it would have in such case, and no more: *Haviland v. Columbus*, 50 Ohio St. 471. Assessments for sewers by frontage have been sustained in many cases: see *Keese v. Denver*, 10 Colo. 112; *English v. Wilmington*, 2 Marvel (Del.) 63; *Payne v. South Springfield*, 161 Ill. 285; *Rutherford v. Hamilton*, 97 Mo. 543. Such an assessment was, however, in *Clapp v. Hartford*, 35 Conn. 66, held too unreasonable to be sanctioned; and one was held invalid in *State v. Paterson*, 48 N. J. L. 435. In *Weed v. Boston*, 172 Mass. 28, a sewer assessment according to frontage was held unreasonable and disproportionate where the sewer was laid not in a street or way but in a strip of private land taken for the purpose, so that the lots varied greatly in size or depth and value per foot, and might be inadequate to bear the burden of the assessment. In *Dexter v. Boston*, 176 Mass. 247, a statute making the expense of constructing a sewer, to an amount not exceeding four dollars a lineal foot, assessable on the owners of adjacent lands according to frontage, was held void, since such assessment would not necessarily be proportioned to the benefits received. So, in *State v. Pillsbury*, 82 Minn. 359, a city charter providing for the assessment upon abutting property, for the construction of a sewer, of an arbitrary sum, long before adopted, per lineal foot of frontage, was held

settled by the statute.¹ The principle is the same with that which supports assessments made through the intervention of assessors or commissioners. The benefits, actually or presumptively received, support the tax. Apportioning the cost by

to be arbitrary and unequal. Rule for assessing a tract of land under a city's water-frontage tax-law where the land abuts for 650 feet on one street, and for 2,000 feet on another, determined: *State v. Lewis Co.*, 72 Minn. 87. An assessment according to frontage made by the water commissioners against property not using water but in front of which the pipes are laid is neither a local assessment nor a specific tax, and does not comply with any rule of uniformity, and, therefore, is void: *Jones v. Water Com'rs*, 34 Mich. 273. And in *Blades v. Water Com'rs*, 122 Mich. 361, a statutory provision for the assessment of individual lot-owners for the cost of laying water-pipe in the block wherein their lots are situated, "in the proportion ascertained by the ratio which the narrowest frontage of said lot bears to the entire frontage on both sides of the street or alley in the block," was held illegal.

¹ *Kelly v. Chadwick*, 104 La. 719. The fact that the lots fronting on a street differ somewhat in depth and value does not of itself render void for inequality assessments against them according to frontage, for the improvement of the street: *Beaumont v. Wilkes-Barre*, 142 Pa. St. 198; *Witman v. Reading*, 169 Pa. St. 375. Inequality in the surface of land abutting on a street does not warrant any departure from the front-foot rule in assessments for street improvements, when the rule is expressly enjoined by the statute under which the improvements are made: *McKeesport v. Busch*, 166 Pa. St. 628. In assessing on abutters the cost of paving a street, it is proper to assess in proportion to frontage,

although the buildings upon some lots are more valuable than upon others: *O'Reilly v. Kingston*, 39 Hun 285. In applying the front-foot rule it was held to be "no defense against the claim that the property is but a narrow strip along the street, and not worth the amount of the assessment:" *Harrisburg v. McCormick*, 129 Pa. St. 213. See *Whitney v. Quackenbush*, 54 Cal. 406. In *Terry v. Hartford*, 39 Conn. 286, the opening of the street for which a special assessment was made left a narrow strip of land on each side belonging to Terry; so narrow as to be incapable of use, except in connection with the adjacent lands. It was nevertheless assessed heavily for benefits. The case showed that both this and the adjacent land would be largely benefited if used together. The court say, "when we consider that here is land that would be benefited to an amount of more than \$3,600 by the laying out of this street, should the annexation be made, and the land adjoining would likewise be benefited to a large amount under the like circumstances, and that no benefit would be conferred on either tract so long as they remain the property of different proprietors, is it reasonable to suppose that there can be any serious obstacle to prevent the one owner from selling and the other from buying, when so great an advantage would result to both from such sale and purchase? A consideration of this character, no doubt, had its proper effect in the determination of the question whether the land was benefited or not, and the extent of that benefit." See also

the frontage on the improvement is adopted by the legislature as constituting, in the judgment of its members, an apportionment in proportion to benefits as nearly as is reasonably practicable. This we understand to be substantially the view taken by the authorities.¹

Terry v. Hartford, 39 Conn. 291. On the other hand, it was held in *Atlanta v. Hamlein*, 96 Ga. 381, and in *Atlanta v. Hanlein*, 101 Ga. 697, where the land was a narrow strip seven feet in width at one end, three feet in width at the other, and extending 407 feet along the line of the improved street, the cost, estimated upon the front-foot rule, being \$721, and the highest estimated value of the property, after the completion of the improvement, being \$260, that the case was one of such doubtful benefit and probable spoliation as to justify the interference of a court of equity.

¹ See *State v. Fuller*, 34 N. J. L. 227, 232; *Schenley v. Commonwealth*, 36 Pa. St. 29, 57; *Northern Ind. R. Co. v. Connelly*, 10 Ohio St. 159, 165. The fact that the benefits from a street improvement have been distributed along the line of the improvement in proportion to frontage will not make the assessment void even if required to be by benefits, where that method properly apportions the benefits: *State v. Passaic*, 37 N. J. L. 65; *Raymond's Estate v. Rutherford Borough*, 55 N. J. L. 441, 56 N. J. L. 340; *De Witt v. Elizabeth*, 56 N. J. L. 125; *Long Branch Police, etc. Com. v. Dobbins*, 61 N. J. L. 659; *Dooling v. Ocean City (N. J.)*, 50 Atl. Rep. 621. Where the legislature has invested a municipal body with power to provide by ordinance for assessing the cost of an improvement upon the property benefited, if such body adopts the rule of frontage as the rule of apportionment, the courts cannot, without statutory authority to do so, interfere with the deter-

mination, unless a clear case of abuse is made out: *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1, overruling *Baltimore v. Scharf*, 54 Md. 499. It is no objection to the validity of an ordinance authorizing the repaving of a street that the cost is apportioned by the front-foot rule, when all parties interested have had ample opportunity to contest the adoption of the rule before the passage of the ordinance: *Baltimore v. Stewart*, 92 Md. 535. Under a statute providing that the costs of an improvement shall be assessed on all property in the improvement district according to the number of feet of lands and lots fronting thereon, and included in the district, and in proportion to benefits derived, the assessment must be according to benefits, at the same time having reference to frontage; and it may be found that all the property is equally benefited in proportion to its frontage: *New Whatcom v. Bellingham Bay Imp. Co.*, 16 Wash. 131. The collection of an assessment on the frontage basis for the improvement of a street will not be enjoined for the failure of the ordinance to show affirmatively that the question of benefits was considered: *Schroder v. Overman*, 61 Ohio St. 1. A street improvement act cannot be held unconstitutional so as to invalidate an assessment thereunder, as making an assessment by the front-foot rule without reference to benefits, unless there is proof showing the assessment to be unjust: *Hadley v. Dague*, 130 Cal. 207. A finding that the board of public works made an assessment for paving according to benefits held conclusive

The frontage rule, it has frequently been held, cannot be made to apply to rural lands;¹ it is, however, applicable to an urban corner lot according to the frontage of such lot upon the improvement, irrespective of the fact that the lot has a front upon another street which meets the improved one at a right angle.² Where the front-foot method is adopted, property

against an objection that the assessment was made arbitrarily on the foot-front rule: *State v. District Court*, 80 Minn. 293. Assessments on each lot of half the cost of that part of an elevated road-way ranging from ten to fifteen feet in height in front thereof were held to be practically uniform and hence valid: *King v. Portland*, 38 Or. 402. It was held in *McKee v. Pendleton*, 154 Ind. 652, that town trustees in making an assessment for street improvements cannot assess each front foot of abutting property equally, without considering the benefits to each lot. Recent Indiana statutes for the improvement of streets make frontage the *prima facie* rule for assessment, but it is held that they do not exclude the right to have the assessment made according to the special benefits, and, therefore, are valid: *Adams v. Shelbyville*, 154 Ind. 467; *Indianapolis v. Holt*, 155 Ind. 222; *Taylor v. Crawfordsville*, 155 Ind. 403; *Schaefer v. Werling*, 156 Ind. 704; *Martin v. Wills*, 157 Ind. 153; *Leeds v. De Frees*, 157 Ind. 392; *Shank v. Smith*, 157 Ind. 401; *Hibben v. Smith* (Ind.), 62 N. E. Rep. 447; *Wray v. Fay* (Ind.), 62 N. E. Rep. 1004. As to statutory correction of errors in an assessment by frontage, see *Griswold v. Pelton*, 34 Ohio St. 482.

¹The frontage rule, as applied to rural lands, is "unequal, unjust, and unconstitutional; and in thus saying we but repeat what has been said over and over again in a long series of cases commencing with the Washington Avenue Case, 69 Pa. St. 352, and ending with *Craig v. City of*

Philadelphia, 89 Pa. St. 268." *Gordon, J., Philadelphia v. Rule*, 93 Pa. St. 15. See *Seely v. Pittsburg*, 82 Pa. St. 360; *Scranton v. Pennsylvania Coal Co.*, 105 Pa. St. 445; *Scranton v. Bush*, 160 Pa. St. 499. A statute authorizing the improvement of township roads and streets held unconstitutional in so far as it provided for assessing the cost according to the foot-front rule and not according to exceptional benefits: *New York & G. L. R. Co. v. Township Committee*, 55 N. J. L. 463. See *Graham v. Conger*, 85 Ky. 582. Whether the land is rural or urban property at the date of the assessment, not at the date of the passage of the ordinance, governs its liability to the foot-front rule: *Keith v. Philadelphia*, 126 Pa. St. 575. Owners of rural property who protest against an ordinance providing for paving a street passage through it at their expense for other reasons than because it is rural property will be estopped from setting up that defense in an action to collect the assessment: *Pepper v. Philadelphia*, 114 Pa. St. 96. The question whether property charged in a special assessment is urban and subject to the foot-front rule, or rural, is one of fact for the jury: *McKeesport v. Soles*, 165 Pa. St. 628.

²*Moberly v. Hogan*, 131 Mo. 19. A corner lot may be assessed for the improvement of each street, though the improvements are of the same character, and are made at the same time: *Allen v. Krenning*, 23 Mo. 561. The higher assessment of corner lots to meet the expense of street improvements, than of inside lots, is

not abutting on the improvement is not subject to assessment.¹

In some instances a somewhat different method has been adopted for levying the cost of local works. Instead of estab-

valid: *Nevin v. Roach*, 86 Ky. 492. A corner lot may be charged with the cost of improving the intersection of the two streets: *Wolf v. Keokuk*, 48 Iowa 129. See *Sands v. Richmond*, 31 Grat. 571. Where the owners of abutting lots are vested with the fee titles of streets to their center, the owners of corner lots are liable for the cost of paving the area in front of intersecting street: *Schenectady v. Trustees of Union College*, 66 Hun 179. A requirement that abutting lot-owners shall pay for street improvements is not necessarily oppressive and unlawful because it bears more heavily on owners of corner lots than on others: *Springfield v. Green*, 120 Ill. 269.

¹*Cincinnati v. Batsche*, 52 Ohio St. 324; *Cincinnati v. Anderson*, 52 Ohio St. 600. See *Perine v. Erzgraber*, 102 Cal. 234. "Bounding or abutting" on a street will include the soil of a private road opening into the street: *Pound v. Plumstead Board of Works*, Law Rep. 7 Q. B. 183. Where a strip of ground from one side of a street is appropriated for the purpose of widening such street, the lots and lands fronting on the opposite side of the street at the part widened will be deemed to abut on the improvement, though the street intervenes between the abutting lots and lands and the strip appropriated: *Cincinnati v. Basche*, *supra*. Where a strip of land ninety-one feet in width was dedicated for a street, and the municipal authorities improved a street thereon of the width of ninety feet, leaving one foot on one side thereof unused, except in sloping the embankments and excavations, the owners of prop-

erty abutting on such foot of land became liable to be assessed as owners of property abutting on the improvement: *Richards v. Cincinnati*, 31 Ohio St. 506. See *Ottumwa, etc. Co. v. Ainley*, 109 Iowa 386. So, where a sidewalk intervened between the street improvement and the lots bounding on the sidewalk, such lots were subject, as "contiguous" to the proposed improvement, to special taxation to defray the expense of the latter: *Chicago, B. & Q. R. Co. v. Quincy*, 136 Ill. 563. See *Allman v. District of Columbia*, 3 D. C. App. 8. Where an ordinance provides that the cost of improving and paving city streets shall be assessed on abutting lots, corner lots, the sides of which are bounded on a street so improved, are liable as abutting on such street: *Springfield v. Green*, 120 Ill. 269; *Wilbur v. Springfield*, 123 Ill. 395. Property adjoining or bordering on a street is, in law, abutting property, and liable to be assessed for street improvements without regard to its frontage on another street: *Meyer v. Covington*, 103 Ky. 545. "Adjoining" means touching or contiguous, as distinguished from lying near or adjacent: *Matter of Ward*, 52 N. Y. 395, citing *Rex v. Hodge*, 1 M. & W. 371; *Peverelly v. People*, 3 Park. C. R. 59; *Holmes v. Carley*, 31 N. Y. 289. See *Johnson v. District of Columbia*, 6 Mackey 21. The expression "front foot" is synonymous with abutting foot: *Moberly v. Hogan*, 131 Mo. 19. In determining, for the purpose of a special assessment, which property fronts upon a sidewalk, practical frontage is not the test, but the officials must be guided by the plats

lishing a taxing district, and apportioning the cost throughout it by some standard of benefit, actual or presumptive, the case of each individual lot fronting on the improvement has been taken by itself, and that lot has been assessed with the cost of the improvement along its front; or perhaps with one-half the cost, leaving the opposite lot to be assessed for the other half. If such a regulation constitutes the apportionment of a tax, it must be supported when properly ordered by or under the authority of the legislature. But it has been denied, on what seem the most conclusive grounds, that this is permissible. It is not legitimate taxation because it is lacking in one of its indispensable elements. It considers each lot by itself, compelling each to bear the burden of the improvement in front of it, without reference to any contribution to be made to the improvement by any other property, and it is consequently without any apportionment. From accidental circumstances, the major part of the cost of an important public work may be expended in front of a single lot; those circumstances not at all contributing to make the improvement more valuable to the lot thus specially burdened, perhaps even having the opposite consequence. But whatever might be the result in particular cases, the fatal vice in the system is that it provides for no taxing districts whatever. It is as arbitrary in principle, and would sometimes be as unequal in operation, as a regulation that the town from which a state officer chanced to be chosen should pay his salary, or that that locality in which the standing army, or any portion of it, should be stationed for the time being should be charged with its support. If one is legitimate taxation the other would be. In sidewalk cases a regulation of the kind has been held admissible, but it has been justified as a regulation of police, and is not supported on the taxing power exclusively.¹ As has been well said, to compel individ-

and records: *Scott County v. Hinds*, 50 Minn. 204. "Frontage" of lot, how determined, with reference to assessment: *Sandrock v. Columbus*, 51 Ohio St. 317. As to "frontage" in case of corner lots, see *Toledo v. Sheill*, 53 Ohio St. 447. A lot is not "fronting" on a street when it is separated from it by a narrow strip:

Philadelphia v. Eastwick, 35 Pa. St. 75. "In front" of a lot construed to embrace, in case of a corner lot, not only the front, commonly so called, but the line of the lot on the side street also: *Des Moines v. Dorr*, 31 Iowa 89; *Morrison v. Hershire*, 32 Iowa 271.

¹ See *ante*, pp. 1128, 1129.

uals to contribute money or property to the use of the public, without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is to lay a forced contribution, not a tax, within the sense of those terms as applied to the exercise of powers by any enlightened or responsible government.¹

Although, as has been stated, an assessment by frontage is really based upon the idea that the estates taxed receive a benefit in proportion to frontage, yet when the legislature have made benefits the rule of assessment, and provided for assessors or commissioners to ascertain and apportion them, it is not arbitrarily to be assumed that the benefits to any particular lot are in fact in proportion to its front on the improvement. In such cases the assessors or commissioners have a duty to perform, on inspection and examination of the several estates; and a report by them that they have assessed the expense by the foot front, without saying that they find the benefits in that

¹ *Christiancy, J.*, in *Woodbridge v. Detroit*, 8 Mich. 274, 301. The case of *Lexington v. McQuillan's Heirs*, 9 Dana 513, is a decision that the improvement of a street cannot be compelled on any such basis. To the same point is *Motz v. Detroit*, 18 Mich. 495. And see *St. Louis v. Clemens*, 49 Mo. 552; *Neenan v. Smith*, 50 Mo. 525, 531. The case of *Warren v. Henley*, 31 Iowa 38, is *contra*. *Weeks v. Milwaukee*, 10 Wis. 258, which also seems to be *contra*, appears to be based upon a practice in that state before the constitution was adopted. In the subsequent case of *State v. Portage*, 12 Wis. 562, it was held, under a charter which permitted the expense of an improvement on the abutting lots, in proportion to the front or size of such lots respectively, an ordinance directing that each lot should be charged with the cost of the improvement in front of it was void. "This," says *Paine, J.*, speaking of the provision of the charter, "it is

obvious, is an entirely different principle of assessment from that which charges each lot with the entire expense of the improvement in front of it, and serves to avoid much of the inequality and injustice of the latter system." See, also, *Meggett v. Eau Claire*, 81 Wis. 326. In *Barber Asphalt Paving Co. v. Watt*, 51 La. An. 1345, and *Moody & Co. v. Chadwick*, 52 La. An. 1888, an owner was held liable only for his proportion, according to his frontage, of the total cost of paving a street, and not for the cost according to his frontage of the paving along the front of the square in which his lots were situated. It was held in *Barker v. Southern Const. Co. (Ky.)*, 47 S. W. Rep. 608, that where the cost of making sidewalks in some blocks is twice as much per yard as that of making sidewalks in front of other blocks, it is improper to assess the cost of the sidewalks at an average price per yard for the whole length of the street.

proportion, does not affirmatively show a performance of their duty.¹

Apportionment by the acre, as a basis for an assessment, has frequently been adopted in levee cases. A statute in Mississippi may be taken as an illustration. It provided for a levee tax, prescribed the district of assessment, and directed the tax to be laid by the acre, according to an arbitrary standard of value fixed by the act, as follows: Unimproved lands in a part of the district, \$5 per acre; in the remainder of the district, \$3 per acre; improved lands in a part of the district, \$20 per acre, and in the remainder, \$30 per acre. The act was sustained,² as was also a similar statute in Missouri.³ Street im-

¹ See *Warren v. Grand Haven*, 30 Mich. 24; *State v. Hudson*, 27 N. J. L. 214, 29 N. J. L. 104, 115; *State v. Bergen*, 29 N. J. L. 266; *O'Reilly v. Kingston*, 114 N. Y. 439; *Elma v. Carney*, 9 Wash. 466; *Hayes v. Douglas County*, 92 Wis. 429; *Karsten v. Milwaukee*, 106 Wis. 200. Where the commissioners have specified in the assessment roll the special benefits accruing to each lot, the assessment is not vitiated by the commissioners' giving the frontage of the lots on the street, or by their assessing against each lot the exact cost of the sewer in front of the same: *Springfield v. Sale*, 127 Ill. 359. See *Walker v. Aurora*, 140 Ill. 402. Where the charter provides for assessments on the real estate benefited, an ordinance cannot fix a uniform assessment per foot front: *Violet's Heirs v. Alexandria*, 92 Va. 561.

² *O'Reilly v. Holt*, 4 Woods 645; *Daily v. Swope*, 47 Miss. 367. See the previous cases of *Smith v. Aberdeen*, 25 Miss. 458; *Williams v. Cammack*, 27 Miss. 209; *Alcorn v. Hamer*, 38 Miss. 652.

³ *Egyptian Levee Co. v. Hardin*, 27 Mo. 495. See, also, the Louisiana and Arkansas cases: *Crowley v. Copley*, 2 La. An. 329; *Yeatman v. Crandall*, 11 La. An. 220; *Wallace v. Shelton*,

14 La. An. 498; *Bishop v. Marks*, 15 La. An. 147; *Richardson v. Morgan*, 16 La. An. 429; *McGehee v. Mathis*, 21 Ark. 40. In *Wallace v. Shelton*, *supra*, the levee tax was a specific tax by the acre. *Merrick*, Ch. J., says: "The legislature has established, at different periods, different principles in regard to the assessments made for the levee district for these parishes, viz.: 1st. That it was right, equal, and just to levy an *ad valorem* assessment upon the lands alone; that the property receiving the advantage should bear the burden. 2d. That, in order to protect the people from inundation, it was just and equal that they should pay an *ad valorem* assessment upon all of their taxable property in the levee district. 3d. That it costs (as in the Draining Case) as much to protect one acre of land from inundation as it does another; that every acre of land in the district of land subject to overflow will be benefited to a much greater amount than the assessment, and that, therefore, it is just and equal that every acre should pay into the hands of the agents charged with protecting it the same sum as every other acre; and now, by a statute, since this litigation arose, and fourthly, that the second

provements in towns are sometimes made at the cost of abutting lots in proportion to their area, in the belief that this is an equally reasonable and just standard of apportionment with any other.¹

Assessment by value of lots. This has sometimes been ordered in levee cases, and also in the case of street improvements.² In the latter case, the buildings erected upon the lands are sometimes excluded from the valuation, and very justly so, as the improvements, while increasing largely the market value of land as such, do not usually increase perceptibly the value of the buildings erected upon it.³

and third principles ought to be combined, and that *the land* ought to be subject to a specific tax, and all other property to an *ad valorem* tax. It is easy to perceive, by examination, that none of these theories can attain absolute equality, or bring about exact justice among the different individuals composing a community subject to assessment. The first and second theories operated harshly upon those persons who occupied high tracts of land, and had already protected themselves by sufficient levees at their own expense; and there may be cases of individual hardships under the third and fourth theories of legislation. But it is not pretended but that the plaintiff is benefited to the full amount of his assessment. The money he pays to the agents appointed to protect his property is restored to him in the increased value of his lands, and their security from overflow. The argument that he may not wish to sell or cultivate his lands, and that he may prefer that the soil be raised by the overflow each year, cannot be admitted. *Salus populi suprema lex.* The obstinacy of a proprietor in one case, or the wishes of the capitalist who holds by a speculation in another, cannot be permitted to stand in the way of the safety of a whole

community. Courts of justice cannot look to these wishes of parties, but must judge of their liability to assessment and taxation by reference to their property. The argument which would relieve them from the assessment in this case would relieve them from taxation in every other."

¹ See *Gillette v. Denver*, 21 Fed. Rep. 822; *Keese v. Denver*, 10 Colo. 112; *Clapp v. Hartford*, 35 Conn. 66; *Swain v. Fulmer*, 135 Ind. 8; *Hines v. Leavenworth*, 3 Kan. 186; *Johnson v. Duer*, 115 Mo. 366; *Heman v. Allen*, 156 Mo. 534.

² A statute may provide for an assessment by value of the land benefited by irrigation, instead of an assessment in proportion to actual benefits conferred by the improvement, to pay for the cost of constructing the works: *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112.

³ See *Monticello v. Banks*, 48 Ark. 251; *Mason v. Spencer*, 35 Kan. 512; *Newman v. Emporia*, 41 Kan. 583; *Downer v. Boston*, 7 Cush. 277; *Brewer v. Springfield*, 97 Mass. 152; *Hoffield v. Buffalo*, 130 N. Y. 387; *Snow v. Fitchburg*, 136 Mass. 183; *Creighton v. Scott*, 14 Ohio St. 438; *Northwestern, etc. Bank v. Spokane*, 18 Wash. 456. The levee tax sustained in *Williams v. Cammack*, 27

Property subject to assessment. It has been shown in another place, that while these local assessments are laid under a taxing power, they are not taxes in the ordinary understanding of that term, and that, consequently, the usual exemptions from taxation will not preclude the property exempted being subjected to them.¹ But this statement can only be applicable

Miss. 209, was laid under an act which provided for a uniform tax of not exceeding ten cents per acre on all lands lying on, or within ten miles of, the river, within a specified county, and of five cents per acre on lands lying ten miles or more from the river. The court says that the act rests upon the same basis with all other taxation. In some cases the assessments have been laid on the value of lots as assessed for ordinary taxes: see *People v. Whyler*, 41 Cal. 351; *Lockwood v. St. Louis*, 24 Mo. 20. As to apportionment of valuation, see *Boehme v. Monroe*, 106 Mich. 401. A special tax not exceeding twenty-five per cent of the assessed value of the lot, calculating a depth to such lot of 150 feet, means that only a depth of 150 feet shall be considered in determining its assessed value, and not that a lot of less than that depth shall bear a smaller tax than one of greater depth: *Stifel v. Brown*, 24 Mo. App. 102. In *Howell v. Tacoma*, 3 Wash. St. 711, it was held that a charter provision that the cost of street improvements should be assessed upon the lots and parcels of land having a frontage upon the improved street, ratable according to the valuation of each, allowed assessments only in such parts of the city as had been platted into lots and parcels extending back a uniform distance from the street. It was decided in *Walker v. Ann Arbor*, 118 Mich. 251, that under a statute providing that sewers might be constructed at the expense of the lands adjacent thereto,

an assessment on the basis of the value of each parcel, "exclusive of improvements," was void. Under a statute limiting assessments for public improvements to twenty-five per cent of "the value of the property as assessed for taxation," in fixing the valuation of land for assessment, by the front foot or otherwise, the value of the improvements thereon must be considered, rather than the land alone: *Findlay v. Frey*, 51 Ohio St. 390.

¹ *Ante*, pp. 362, 363. A special assessment against a homestead for a sidewalk is not a "tax" within the meaning of a constitutional provision subjecting homesteads to forced sales for taxes due thereon: *Higgins v. Bordages*, 88 Tex. 458. In Arkansas a homestead is not exempt from the lien for assessments for local improvements: *Ahern v. Board of Imp.*, 69 Ark. 68. And in Kentucky it is held that the law making adjacent property liable to assessments for street improvements applies to a homestead, though such property is exempt from creditor's claims: *Nevin v. Allen* (Ky.), 26 S. W. Rep. 180. Where a statute provides that the track and right of way of a railroad shall be exempt from taxation, "except that it shall be subject to special assessments for local improvements in cities and villages," the exception does not become operative to subject such property to assessment in the absence of statutory provisions defining the cases in which it is subject thereto, and describing the manner of levy: *Osh-*

when the assessment is really made on the basis of special benefits which are supposed to be equivalent; for, if it is laid for a work of general utility, in the advantages of which the person assessed participates only as one of the general public, and not as receiving special benefits, it must be considered a general tax, and is improperly designated an assessment. Such has been the conclusion where an assessment was laid upon a railroad company which, by its charter, was exempt from taxation, for the expense of widening a street along which its track was laid; the assessment upon the company being of such portion of the expense as the commissioners deemed "equitable and just," and not being required to be made with any regard to the benefit the improvement might confer upon the company. Say the court: "If the assessment upon the railroad company may be sustained upon the ground of special benefits to the corporation from the increased facilities of travel afforded by widening the street, an assessment may be sustained upon the same ground against the owner of every express wagon or stage-coach that travels the street. The assessment in this case is a clear exercise of the taxing power. It is made for a public purpose, and confers no special benefits upon the property of the company."¹ These reasons take the

kosh, *City R. Co. v. Winnebago County*, 89 Wis. 435. The exception has no affirmative force aside from the provisions as to general taxation which it follows and limits, and the liability of such property to special assessment is not affected thereby: *Chicago, M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 506. A statute providing that assessments for the cost of public improvements shall be made on all land benefited thereby does not repeal an exemption from assessment contained in the charter of a private corporation: *Hudson County Catholic Protectory v. Kearney*, 56 N. J. L. 385. A statute providing that the track, road, or bridge of street railroad companies shall be deemed personal property, and assessed as such in the town or district where located or laid, does not pre-

vent the assessment of the track and right of way of a street railroad for contiguous local improvements: *Cicero & P. St. R. Co. v. Chicago*, 176 Ill. 571.

¹ *State v. Newark*, 27 N. J. L. 185, 195, per *Green*, Ch. J. In Arkansas the right of way of a railroad is not liable to assessment for municipal improvements unless such property is shown to have been benefited thereby; and such right of way lying within a local improvement district is not subject to sale to satisfy such an assessment: *Kansas City, P. & G. A. Co. v. Waterworks Imp. Dist.*, 68 Ark. 376. In California the track of a street railway company which was so attached to the soil of the street as to become part of the realty was held to be assessable for paving the street; the court pointing out

levy out of the category of assessments properly so called, and to which all property specially benefited is liable to be subjected.

the difference in the benefits likely to be received by a street railway when the street in which its track is laid is improved, and those which a railway between distant points might be supposed to derive from a like improvement along its track: Appeal of North Beach, etc. R. Co., 32 Cal. 499. California statutes requiring the owners of a railroad to improve a certain part of the streets over which their track is laid do not require that they shall be assessed for part of the expense of improving the street under a contract between the city and contractors: McVerry v. Boyd, 89 Cal. 304. In Connecticut it is held that where improvements do not "specially benefit" or enhance the value of the railroad property, no assessment can be made; if the question is what "land and buildings" will be specially benefited by paving a street, the query then is simply whether the company receives such special benefit as to be liable to be assessed for the improvement; an assessment cannot be made on the ground of the increased value of the franchise of the railroad, such franchise being a thing entirely distinct from the term "land and buildings"; whether the company's right to lay its rails in the street and maintain them so long as permitted by the borough, *quære*: Farmers' L. & T. Co. v. Ansonia, 61 Conn. 76. An assessment could not be made on the ground that the borough had done certain work which the railroad, under its charter, was bound to pay for, the charter obligation remaining in full force after the improvements: Ibid. In Bridgeport v. New York & N. H. R. Co., 36 Conn. 255, it was denied that

the easement of the railroad company in the land occupied for its track could be assessed for benefits for laying out a street along its side; while in New Haven v. Fair Haven & W. R. Co., 38 Conn. 422, a street railroad was held liable for the expense of paving the street in which it ran, under a charter providing that the expense should be assessed "upon the persons whose property is especially benefited." In Illinois it was held that a railroad's right of way in an avenue could not be assessed as "contiguous property abutting" on the avenue, because such right of way is not "property" within the meaning of that term: South Park Com'rs v. Chicago, B. & Q. R. Co., 107 Ill. 105. But it has since been held repeatedly that such a right of way in, or parallel with, a street or avenue is "contiguous property" so far as street improvements are concerned, within a statute subjecting such property to special tax for local improvements: Kuehner v. Freeport, 143 Ill. 92; Freeport St. R. Co. v. Freeport, 151 Ill. 451; Rich v. Chicago, 152 Ill. 18; Chicago, R. I. & P. R. Co. v. Moline, 158 Ill. 64; Illinois Central R. Co. v. Kankakee, 164 Ill. 608; Chicago & N. W. R. Co. v. Elmhurst, 165 Ill. 148; Illinois Central R. Co. v. People, 170 Ill. 224; Chicago & P. St. R. Co. v. Chicago, 176 Ill. 501; West Chicago St. R. Co. v. Chicago, 178 Ill. 339. The commissioners of a drainage district have jurisdiction to assess railroads as specially benefited by a drain's establishment: Commissioners v. Commissioners, 127 Ill. 581; Illinois Central Co. v. Commissioners, 129 Ill. 417. A railroad company's land used only for a right of way may be

Personal property is not commonly thus assessed. The reason is manifest in the fact that special benefits generally accrue al-

pecially taxed for a local improvement consisting of a sewer in an adjoining street: *Chicago & A. R. Co. v. Joliet*, 153 Ill. 649. Railway property, if specially benefited by park or boulevard improvements, may be assessed therefor: *Chicago & N. W. R. Co. v. People*, 120 Ill. 104. Under the Illinois statute providing that sidewalks may be "constructed by special taxation of the lot, lots, or parcels of land touching upon the line where such sidewalk is ordered," any piece of land so lying may be assessed, although it is part of an unplatted railroad right of way extending through the state: *Illinois Central R. Co. v. People*, 170 Ill. 224. A special assessment for street improvements need not, in Illinois, be made against a street railroad's right of way as an entirety, but may be made against that part only which extends along the improvements: *Lake St. Elevated R. Co. v. Chicago*, 183 Ill. 75. Where the local improvement consists in widening a street where it passes under a railroad track, the cost of it cannot be assessed upon the railroad's right of way, since the railroad property is not benefited by the improvement: *Bloomington v. Chicago & A. R. Co.*, 134 Ill. 451. The right of way, franchise, and interest of an elevated railroad which occupies no part of the surface of the street save that it is supported over the same by iron columns are liable to special assessments for improvements on the street over which the road runs: *Lake St. Elevated R. Co. v. Chicago*, 183 Ill. 75. A railroad company whose only interest in a certain track is the right by contract to run its trains over the track has no such title thereto as can be subjected to spe-

cial assessment for a local improvement: *Louisville & N. R. Co. v. East St. Louis*, 134 Ill. 656. An ordinance for paving a street is not invalid because it excludes from the proposed improvements the right of way of a street railroad in such street: *Lightner v. Peoria*, 150 Ill. 80. Though a city has granted to a railroad company the privilege of using a street for its tracks, it may by special tax make necessary improvements therein, even if the company has agreed to improve the street so as to make it safe for vehicles crossing: *Chicago, B. & Q. R. Co. v. Quincy*, 139 Ill. 355. The rights of way of an elevated and a street railroad company in a street may be assessed for a sewer although an ordinance accepted by the companies requires the latter to make certain surface improvements upon a specified width of the street: *Bickerdike v. Chicago*, 185 Ill. 280. That an accepted ordinance requiring a street railway company to pave and keep in good repair a certain width of street constitutes a valid contract exempting the company from improving such street, see *ante*, p. 108. In Indiana the right of way of a railroad company abutting upon or bordering on a street may be assessed for the street's improvement: *Peru, etc. R. Co. v. Hanna*, 68 Ind. 562. And benefits may be assessed against a railroad's right of way in a drainage proceeding: *Louisville, N. A. & C. R. Co. v. State*, 122 Ind. 443. But under a charter authorizing the cost of an improvement of a street to be apportioned upon the lands or lots abutting on the street, a railroad right of way that lies wholly within the street is not liable: *Indianapolis & V. R. Co. v.*

most exclusively to lands.¹ When, however, an exceptional assessment is levied upon a municipality for the special benefits

Capitol Paving, etc. Co., 24 Ind. App. 114. The Iowa statutes are held in *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112 Iowa 300, not to authorize a city to make a special assessment against a railroad company for paving a street on which its right of way abuts; and it is said that "reconciliation of the cases [in the different states] is impossible." Under a city charter in Iowa authorizing the city to require the abutting lot owners to pave a street, a railroad company having a right to lay its track in a lot not owned by it is not liable for paving the street: *Muscatine v. Chicago, R. I. & P. R. Co.*, 88 Iowa 291. In Kansas a railroad company's right of way and switch yards are liable to assessment to contribute to the expense of local

improvements, such as sewers, and the like: *Atchison, T. & S. F. R. Co. v. Peterson*, 58 Kan. 818. In Kentucky the abutting property of a turnpike company may be assessed for the cost of sewerage in a street: *Lewis v. Schmidt* (Ky.), 43 S. W. Rep. 433. In Massachusetts a railroad company's right of way is not subject to a special assessment for a sidewalk: *Boston v. Boston & A. R. Co.*, 170 Mass. 95. In Michigan a section of the right of way of a railroad company, occupied by its tracks and used for no other purpose, cannot be assessed for the expense of paving a street which crosses it, under a city charter requiring such assessments to be made according to benefits received: *Detroit, G. H. & M. R. Co. v. Grand Rapids*, 106 Mich. 13. And al-

¹ A statute providing that the just proportion of the compensation for private property taken by a city for public use shall be assessed on the owners or occupants of the land deemed to be benefited thereby, and that the assessment shall be a continual lien on the land assessed, plainly contemplates that the assessment shall be on the land: *Beecher v. Detroit*, 92 Mich. 268. A city charter authorizing the city council to make certain street improvements at the expense of the abutting landowners, "and to levy and collect such local assessments on each of such lots," does not authorize the collection of such tax from the lot-owner's personalty: *McCrowell v. Bristol*, 89 Va. 652. A statute providing that the cost of improving a country road shall be apportioned among the several tracts of land within half a mile of the improvement "according to the benefits to the real and personal property . . .

derived from such improvement," is unconstitutional in including personalty for purposes of assessment: *Wyandotte County Com'rs v. Abbott*, 52 Kan. 148. Under a charter providing that assessments for local improvements shall be levied on real estate only, an ordinance providing that both the land and the improvements shall be subject to assessment for such improvements is void: *Spokane Falls v. Browne*, 3 Wash. St. 84. An assessment of property of a railroad to pay for the construction of a sewer in a sewer district of a city, based on valuations made by the state executive council, was held void, as being in part a tax on personalty for the construction of a sewer: *Chicago, M. & St. P. R. Co. v. Phillips*, 111 Iowa 377. An assessment levied upon every bale of cotton produced on taxable land within a levee district was held to be properly a local assessment: *Excelsior, etc. Co. v. Green*, 39 La. An. 455.

its people receive from a public building or other work of the state or of some larger subdivision of the state, the benefits are

though the assessment is made according to frontage, a railroad company is not assessable for paving a street because its track is located therein, and abuts upon the section of the street so improved: *Boehme v. Monroe*, 106 Mich. 401. But an assessment for benefits upon a part of a railroad company's right of way and road-bed, including a freight-house on said right of way, occasioned by the paving of the street upon which such property abutted, was sustained, the sale of the property to satisfy the assessment being, however, set aside, though without prejudice to the city's right otherwise to enforce the assessment: *Lake Shore & M. S. R. Co. v. Grand Rapids*, 102 Mich. 374. In Minnesota, where a street grade was changed so as to cross railroad tracks on a bridge, the railroad companies were held not liable for damages to abutting owners, but these were rightly imposed on the property benefited by the change: *Kelly v. Minneapolis*, 57 Minn. 294. In Missouri, land used by a railroad company for depot and yard purposes is liable to a special tax for street improvements: *Nevada v. Eddy*, 123 Mo. 546. Under the New Jersey statute requiring the benefits for the improvement of a street to be assessed upon each lot, parcel, or piece of land benefited thereby, an assessment of such benefits against a street-railway constructed and operated along the street is not authorized: *Davis v. Newark*, 54 N. J. L. 144; *Dean v. Paterson* (N. J.), 50 Atl. Rep. 620; *North Jersey St. R. Co. v. Jersey City* (N. J.), 52 Atl. Rep. 300. But the road-bed of a railway in a street may, upon the basis of the benefit received, be assessed for the expense of a sewer

in the street: *Paterson & H. R. Co. v. Passaic*, 54 N. J. L. 340. And an assessment on the basis of benefits, for widening a street, upon houses and lots owned by the company, was supported in *State v. Newark*, 27 N. J. L. 185. In New York, under a charter provision that no part of the expense of grading or paving a street should be assessed upon any lands not "bordering on or touching" the street, it was held that a street railroad in the street could not be assessed: *O'Reilley v. Kingston*, 114 N. Y. 439. See *Heiser v. New York*, 104 N. Y. 68. Tracks of a surface railway in New York city are not subject to taxation for paving the street where the statute provides that the assessment is to be divided among the owners of houses and lots intended to be benefited thereby in proportion to advantage: *People v. Gilon*, 126 N. Y. 147. The franchise of a railroad company owning and occupying a road-bed is not liable to an assessment for opening a street, though the road-bed lies within the area of the assessment: *In re Com'rs of Public Parks*, 47 Hun 302. Where a railroad lay below the surface of a street, and was in part carried through tunnels, it was held that as it received no benefit from paving and improving the street, it should not be assessed for the expense: *People v. Gilon*, 41 Hun 510. The legislature has authority to determine that a railroad company in a street shall bear a part of the expense of paving such street: *Lake Shore & M. S. R. Co. v. Dunkirk*, 65 Hun 494. In Pennsylvania the constitutionality of assessments for street improvements can only be sustained on the ground that the property assessed is benefited by the

usually quite as much to business as to real property, and the burden would not be equally distributed if the assessment were not laid on all property subject to ordinary taxation. This course has generally been adopted;¹ though in the case of works commonly classed under the head of "internal improvements," a different course has been sometimes taken, and real estate alone been taxed.

It is no objection to an assessment for a local work that the property assessed is used for a purpose that will not be specially advanced by the improvement;² as, for instance, that it is dedicated to the purposes of sepulture;³ or is occupied by a build-

improvement: and the road-bed of a railroad company is conclusively presumed not to be benefited thereby: *Allegheny v. Western Penn. R. Co.*, 138 Pa. St. 375. In Texas a city charter providing for a roll showing lots, owners, feet of frontage, and proportionate cost, in case of street improvements, was held to include street-car companies liable for such improvements; and although the charter provided that the cost of paving should be wholly defrayed by the owner of abutting lots or tracts, this was held to refer to the part to be paid for by the property owners, and not to the part for paving which the company was required by the charter to pay: *Storrie v. Houston City St. R. Co.*, 92 Tex. 129. In the state of Washington, under a statute providing that "all property benefited" by a street improvement shall be assessed to the extent of its proportionate part of the expense, a railroad track and right of way may be assessed for benefits: *New Whatcom v. Bellington Bay & B. C. R. Co.*, 16 Wash. 137. In Wisconsin it has been held that a street assessment cannot be enforced against a railroad's abutting right of way, because it is not land, and because public policy forbids the severance of the several parts essential to the use and operation of the road: *Chicago, M.*

& St. P. R. Co. v. Milwaukee, 89 Wis. 506. And where a city charter provides that the expense of a street improvement shall be charged to "any lot or lots fronting on" such street, a railroad company's right of way in the street is not liable: *Oshkosh City R. Co. v. Winnebago County*, 89 Wis. 435. Nor does a statute requiring corporations owning or operating a railroad in a city street to restore the street to its former condition, and "thereafter to maintain the same in such condition against any effects in any manner produced by such railroad," confer authority to levy an assessment on such corporation for the improvement of the street: *Ibid.*

¹ See *ante*, pp. 241-244.

² "The right to assess land for a local improvement does not depend upon the use to which the owner may choose to put such land, or whether he may see fit to put it to any use": *Powers v. Grand Rapids*, 98 Mich. 393, 396.

³ *Baltimore v. Cemetery Co.*, 7 Md. 517. In this case the special objection made was that to subject the property to liability for paving would endanger its perpetuity as a cemetery; but the force of this, says the court, "whatever it may be, equally applies to all the engagements and liabilities of the corporation. The

ing erected for the purposes of public worship,¹ or is devoted to school or charitable purposes,² or constitutes the track of a railroad,³ or is put to any use to which the market value of the property is unimportant. There is nothing necessarily permanent in any present use; not sufficiently so, at least, to give it a controlling influence in determining principles of taxation.

building of a wall of a church, or the improvement of the grounds, may superinduce debt and with it disastrous consequences. Although fully sympathizing with the laudable spirit which, with pious zeal and watchfulness, seeks to preserve the undisturbed repose of the deed, we nevertheless feel ourselves bound to declare that we see nothing in the legislation of the state, nor in the nature of the demand itself, to exempt the appellees from liability." See, to the same effect, *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506. In Kentucky a graveyard cannot be sold to enforce the lien of a special assessment: *Louisville v. Nevin*, 10 Bush 549. Nor can it be in Ohio: but an assessment may nevertheless be enforced by such remedies as law or equity can give: *Lima v. Cemetery Association*, 42 Ohio St. 128. The property of a cemetery association exempt by its charter "from taxation and execution" is in Illinois subject to special assessment for local improvements, and may be sold for delinquency: *Bloomington Cemetery Assoc. v. People*, 139 Ill. 16. Land dedicated by legislature to perpetual use of public as burial ground, and exempted from all public taxes, held not assessable for sewer: *Proprietors v. Board, etc.*, 150 Mass. 12.

¹ *Atlanta v. First Presb. Church*, 86 Ga. 730, overruling *Trustees v. Atlanta*, 76 Ga. 181; *Trustees v. Ellis*, 38 Ind. 3; *Broadway Baptist Church v. McAtee*, 8 Bush 508; *Lefevre v. Detroit*, 2 Mich. 586; *Matter of Mayor, etc. of N. Y.*, 11 Johns. 80;

Northern Liberties v. St. John's Church, 13 Pa. St. 104; *Second Univ. Soc. v. Providence*, 6 R. I. 235. Exemption of church from taxation held to include "frontage" tax levied against it for laying water-pipes in the street upon which it fronts: *Philadelphia v. St. James Church*, 134 Pa. St. 207.

² *Lafayette v. Orphan Asylum*, 4 La. An. 1; *St. Louis Pub. Schools v. St. Louis*, 26 Mo. 468; *Sheehan v. Good Samaritan Hosp.*, 50 Mo. 155; *Cincinnati Coll. v. State*, 19 Ohio 110.

³ *New Haven v. Fair Haven, etc. R. Co.*, 38 Conn. 422; *Bridgeport v. New York & H. R. Co.*, 36 Conn. 255; *Chicago, etc. R. Co. v. Chicago*, 90 Ill. 573; *Kuehner v. Freeport*, 143 Ill. 92; *Lightner v. Peoria*, 150 Ill. 80; *Freeport St. R. Co. v. Freeport*, 151 Ill. 451; *Billings v. Chicago*, 167 Ill. 337; *Cicero & P. St. R. Co. v. Chicago*, 176 Ill. 571; *Burlington, etc. R. Co. v. Spearman*, 12 Iowa 112; *Ludlow v. Trustees*, 78 Ky. 357; *Northern Ind. R. Co. v. Connelly*, 10 Ohio St. 159. A lot of land belonging to a railway company and containing a station and station grounds and a lumberyard is subject to a municipal lien for building sidewalks, although the right of way for a road-bed is not: *Mt. Pleasant v. Baltimore & O. R. Co.*, 138 Pa. St. 365. A street railway has such an interest in a street where the track is laid as may be specially assessed for benefits for widening the street: *Appeal of North Beach, etc. R. Co.*, 32 Cal. 499; *Chicago v. Baer*, 41 Ill. 306. And see *ante*, pp. 1229-1234.

Even public property is often subjected to these special assessments; there being no more reason to excuse the public from paying for such benefits than there would be to excuse from payment when property is taken under the eminent domain.¹ But it is held that in the absence of express statute public property will not be so liable.²

6. Proceedings in levying and collecting assessments.

First there must be competent legislative authority. The district of assessment must either be prescribed by the legislature

¹San Diego v. Linda Vista Irrig. Dist., 108 Cal. 189; Cook County v. Chicago, 103 Ill. 648; McLean County v. Bloomington, 106 Ill. 209; Adams County v. Quincy, 130 Ill. 566; Sioux City v. Independent School Dist., 55 Iowa 150; Edwards, etc. Co. v. Jasper County (Iowa), 90 N. W. Rep. 1006; Board of Com'rs v. Ottawa, 49 Kan. 747; Hassan v. Rochester, 67 N. Y. 528. The real estate belonging to the board of public schools of the city of St. Louis is liable to be assessed, under and by virtue of the ordinances of that city for the construction of sewers, paving of sidewalks, opening of streets, etc.: St. Louis Pub. Schools v. St. Louis, 26 Mo. 468. But exempting public property from the assessment does not render it illegal: People v. Austin, 47 Cal. 353.

²Board of Imp. v. Little Rock School Dist., 56 Ark. 354; Niklaus v. Conkling, 118 Ind. 289; Frankfort v. State, 128 Ind. 438; Sutton v. School Dist. (Ind. App.), 62 N. E. Rep. 710; Big Rapids v. Mecosta Supervisors, 99 Mich. 351; Clinton v. Henry County, 115 Mo. 557; St. Louis v. Brown, 155 Mo. 545; Van Steen v. Beatrice, 36 Neb. 421; Smith v. Buffalo, 159 N. Y. 427; Griswold v. Pelton, 34 Ohio St. 482. In Hartford v. West Middle Dist., 45 Conn. 462, a school district was held not liable to assessment for special benefits to its school-house from the laying out of

a street, the court saying: "The assessment was undoubtedly made upon the idea that the intrinsic value of the property was increased; but if that were so, as a matter of fact, does it follow that it was increased in value as school district property, bought and used solely for school purposes, and did the district, or could it from the nature of things, derive any immediate, direct, or special benefit from the laying out of the street? We are unable to see how the district, as a corporation, could be so benefited, or that their property was rendered any more valuable for the purpose for which they use it, and for which they must continue to use it, if not for all time, at least for a very long period. To render the assessment of benefits legal and valid, it must appear that the benefit is direct and immediate, and not contingent and remote. The grounds on which school property in Illinois is exempted from general taxation are sufficient also to exempt it from special assessments, as for drainage: People v. School Trustees, 118 Ill. 52. Under the Indiana statute, lands appropriated to the support of common schools, and not subject to taxation by the state, are not liable to assessment for the construction of public ditches: Edgerton v. Huntington School T'p, 126 Ind. 261.

or some method of determining it must be given, and the rule of apportionment must be laid down.¹

Where an improvement concerns a municipality, or some portion thereof to be determined on an investigation of facts, it is most usual for the legislature to confer upon the municipal authorities full authority in the premises; to delegate to them the power to determine whether the improvement shall be made, and, if so, through what subordinate agencies, but under such restraints as are deemed important for public and individual protection. Not uncommonly the determination of the rule of apportionment is left to the same authorities. This is not only competent, but in general is deemed the proper course.

In many cases, however, a special district may be requisite, and this may embrace two or more municipalities or parts of two or more. For this or other reason any single municipality may be incompetent to deal with the case, and it may be necessary to create a special authority for the purpose. This is particularly the case with drains, with long highways and with levees; and, when needful, a commissioner or board of commissioners will perhaps be provided for. It is not doubted that the legislature has authority to do this, when not hindered by any constitutional restriction.² The choice

¹ A statute authorizing assessments against property benefited by municipal improvements was held not invalid in that it did not fix any rule for the determination of the amount to be assessed in the district, and that it did not limit the total assessment of the amount of benefits: *Voigt v. Detroit*, 123 Mich. 547.

² "In the matter of assessing for benefits under the power of taxation, it is within the discretion of the legislature to submit the ascertainment of the lands to be assessed, as well as the apportionment of the assessment among the different parcels, to the determination of commissioners appointed as the legislature may prescribe:" *Bauman v. Ross*, 167 U. S. 548. The constitution of Illinois adopted in 1870 provides that: "The

general assembly may vest corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." This is construed as a limitation upon the power of the legislature, and a restriction of the authority to lay local assessments to the municipal authorities named, and it is held that neither commissioners nor juries, nor the county court as such, can be given power to make local improvements—

of commissioners is sometimes made by the legislature itself, sometimes referred to a court,¹ and sometimes, where that course is practicable, given to the people concerned. Other methods of choice, according to circumstances, are not inadmissible. The right of the taxpayer to be heard² at some

such, for example, as a levee — by special assessments or by special taxation of contiguous property: *Urdike v. Wright*, 81 Ill. 49. See also *Harward v. Drain Co.*, 51 Ill. 130; *Hessler v. Drainage Com'rs*, 53 Ill. 105; *Gage v. Graham*, 57 Ill. 144; *Board of Directors v. Houston*, 71 Ill. 318. If, however, a district is made to include several towns, the towns may establish it by accepting the legislation which provides for it: *Ante*, p. 1168. A conclusion differing from that in Illinois was reached in Nebraska under a like constitutional provision: *State v. Dodge Co. Com'rs*, 8 Neb. 124. Drainage commissioners in Illinois may tax for drainage purposes land in another township where the owner of such land has connected his ditches with those of the district; in laying such taxes they act as officers of their district, not of the township: *People v. Drainage Com'rs*, 143 Ill. 417. In New Jersey the legislature may create for local improvement a corporation embracing parts of several townships; and this will be a political corporation if it is given power to grade and pave streets, construct sewers, and make ordinances: *State v. Hackensack Imp. Co.*, 45 N. J. L. 113. And see *ante*, p. 239.

¹ In New York, where a commissioner for a local improvement is to be appointed by a court, and is to be a freeholder, the appointment is conclusive that he is a freeholder: *Deederer v. Voorhies*, 81 N. Y. 153. That should certainly be the rule as against a party having opportunity

to be heard on the appointment, and who made no objection on that ground: *Clark v. Drain Com'rs*, 50 Mich. 618. It has been held that where no assessment district is created, an act providing for commissioners to assess benefits and damages, who shall be disinterested freeholders, is impracticable, since it cannot be known when the commissioners are sworn whether or not they are disinterested: *Montgomery Av. Case*, 54 Cal. 579. As to eligibility or disqualification to act as commissioner or assessor, see *Pearce v. Hyde Park*, 126 Ill. 287; *Shreve v. Cicero*, 129 Ill. 226; *Philadelphia & R. C. & I. Co. v. Chicago*, 158 Ill. 9; *Raymond's Estate v. Rutherford Borough*, 55 N. J. L. 441, 56 N. J. L. 340; *O'Reilley v. Kingston*, 114 N. Y. 439. Proceedings held void for variance in names of commissioners as appointed and as used in affidavits of mailing and posting notices: *Chicago v. Harrison*, 163 Ill. 129. An assessment for improvements in a street made by commissioners appointed to assess the cost of improvements in another street, and that street only, is void: *Ferris v. Chicago*, 162 Ill. 111.

² See *Scott v. Toledo*, 36 Fed. Rep. 385; *Murdock v. Cincinnati*, 39 Fed. Rep. 891, 49 Fed. Rep. 726; *Hutson v. Woodbridge Protec. Dist.*, 79 Cal. 90; *Bensinger v. District of Columbia*, 6 Mackey 285; *Savannah, F. & W. R. Co. v. Savannah*, 96 Ga. 680; *Clarke v. Chicago*, 185 Ill. 354; *Uhl v. Moorhous*, 137 Ind. 445; *Gatch v. Des Moines*, 63 Iowa 718; *Chesapeake*

proper stage of the proceedings is as clear in the case of this species of taxation as any other, and it is customary

& O. R. Co. v. Mullins, 94 Ky. 355; Mayor v. Scharf, 54 Md. 499; Ulman v. Baltimore, 72 Md. 587; Sears v. Street Com'rs, 173 Mass. 350; Whiteford v. Probate Judge, 53 Mich. 130; Sligh v. Grand Rapids, 84 Mich. 497; Overman v. St. Paul, 39 Minn. 120; St. Louis v. Rankin, 96 Mo. 497; Stuart v. Palmer, 74 N. Y. 183; Remsen v. Wheeler, 105 N. Y. 573; McLoughlin v. Miller, 124 N. Y. 510; Poillon v. Rutherford, 65 N. J. L. 538; Pickton v. Fargo (N. D.), 88 N. W. Rep. 90; Hershberger v. Pittsburgh, 115 Pa. St. 78; Hutcheson v. Storrie, 92 Tex. 635; Violet v. Alexandria, 92 Va. 561; Norfolk v. Young, 97 Va. 728; Dietz v. Neenah, 91 Wis. 422. A notice of the meeting of a city board of public works for the purpose of assessing upon property benefited the cost of a public improvement is invalid if it defines, in advance of any hearing, a limited district as embracing the property upon which the assessment is to be made: State v. Otis, 53 Minn. 318. A city, after taking the preliminary steps for improving a street, cannot, at the time of hearing, decide to improve a part only and go on without any new notice and hearing to do so: Stockton v. Whitmore, 50 Cal. 554. Where the legislature determines it, the owners have no right to be heard upon the question whether their lands are or are not benefited, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited: Spencer v. Merchant, 125 U. S. 345. An act of congress creating a general water-system for the District of Columbia, and prescribing the rate of the assessment and the method of its collection, is conclusive as to the necessity of the work and as to the benefits to abutting property; and an owner, being presumed to have notice of the law, cannot complain that he was not notified of the creation of the system or consulted as to the probable cost thereof: Parsons v. District of Columbia, 170 U. S. 45. It is not necessary that a state legislature shall first permit a hearing, either before itself, one of its committees, or any other tribunal, prior to its creating a new taxing district and determining what territory shall belong to it, and what property shall be considered as benefited by the proposed improvement: Williams v. Eggleston, 170 U. S. 304. The failure, where the cost of street improvement is to be assessed by frontage, to provide for a hearing as to benefits, held not fatal: Detroit v. Parker, 181 U. S. 399. A resolution of necessity and notice thereof are not essential to give jurisdiction to a city council, if notice and hearing are given to the property owner before the making of the final assessment: Hughes v. Parker, 148 Ind. 692. The legislature may provide for the fixing of the aggregate amount to be assessed against the property to be benefited by a public improvement, without granting a hearing to the property owners as to such amount: Baltimore v. Ulman, 79 Md. 469. A statute permitting a city council to fix the district benefited by an improvement, and to specify the total amount to be assessed thereupon for benefits, is not invalid in that it provides no notice to owners in relation to the establishment of the district, and to the amount of the assessment: Voigt v. Detroit, 123 Mich. 547. A hearing upon the question of necessity need not be given to one whose land is

to provide for it, either by statute or by ordinance;¹ but there is authority for the proposition that when the apportionment of the assessment involves only a mathematical calculation, the taxpayer is not entitled to be heard;² and in any event it is enough if those who are to bear the burden have a right to be heard before the assessment becomes a final lien upon their

not taken, but who is merely to be assessed: *Roberts v. Smith*, 115 Mich.

5. One whose land is assessed for the cost of making a sewer is not necessarily entitled to notice of the city's intention to lay out the sewer: *Collins v. Holyoke*, 146 Mass. 298. A property owner has no constitutional right to be heard on the validity of a re-assessment in an action therefor by the city where he had notice under the original assessment: *Nottage v. Portland*, 35 Or. 529. One tenant in common cannot object to a special assessment for a street improvement on the ground that a co-tenant was not given the statutory notice, since he may pay his proportion of the assessment and relieve his individual interest: *Birket v. Peoria*, 185 Ill. 369. One could not claim that she had no notice that the cost of guttering and curbing the street in front of her lots was to be assessed against the lots, where there was a general city ordinance providing that such lots should be so assessed: *Arnold v. Fort Dodge*, 111 Iowa 152.

¹ Where a statute provides for an assessment to be made as provided in the city charter for assessing the expenses of a street grading, and the charter provides for notice in such a case, the statute is not defective, as not providing for notice: *Grand Rapids School Furn. Co. v. Grand Rapids*, 92 Mich. 564. A city charter authorizing special assessments is not invalid for want of a provision for notice to property owners, as such provision may be made by

ordinance: *Tripp v. Yankton*, 10 S. D. 516. Where the statute does not provide for constructive notice to property owners of a hearing on ordinances for the construction of sidewalks at their own expense, reasonable actual notice is necessary, and the ordinance must provide for it: *Landis v. Vineland Borough*, 60 N. J. L. 264; *Locker v. South Amboy*, 62 N. J. L. 197. Where an ordinance provides for a board of viewers to apportion among property owners the cost of a sewer, and directs the board to hold meetings at stated times and places to hear all who have an interest, provision for notice is implied: *Paulsen v. Portland*, 149 U. S. 30. A municipal ordinance providing for assessments for street improvements is void if it makes no provision for notice to or hearing by those whose property is to be assessed: *Brown v. Denver*, 7 Colo. 305. It was held in *Taylor v. Boyd*, 63 Tex. 533, and *Adams v. Fisher*, 63 Tex. 651, that no notice to abutting lot owners other than the charter provision that a roll showing the lots and owners shall be prepared by the city engineer and submitted to the council is necessary.

² *Gillette v. Denver*, 21 Fed. Rep. 822; *English v. Wilmington*, 2 Marvel 63; *Amery v. Keokuk*, 72 Iowa 701; *Cleveland v. Tripp*, 13 R. I. 50. See *Dittoe v. Davenport*, 74 Iowa 66. Certain Maryland cases to the same effect have been overruled by *Ulman v. Baltimore*, 72 Md. 58. And *Laughlin v. Miller*, 124 N. Y. 510, is *contra*.

property.¹ As in other cases, notice by publication is sufficient if the statute so provides.² The notice must, of course, comply with the requirements of the statute.³ Where the statute provides for a hearing before commissioners, they have no authority to restrict objections to such as shall be presented in writing;⁴ but the person affected must, in general, make his objections at the time for which notice of hearing is given, and if he fails to do so he will not be heard afterwards.⁵

The rule that the legislative authority cannot delegate its

¹ *Reclamation Dist. v. Evans*, 61 Cal. 104; *Lent v. Tillson*, 72 Cal. 404; *Reclamation Dist. v. McCullah*, 124 Cal. 175; *Speer v. Athens*, 85 Ga. 49; *Weaver v. Templin*, 113 Ind. 298; *Garvin v. Daussman*, 114 Ind. 429; *Law v. Johnston*, 118 Ind. 261; *McEneny v. Sullivan*, 125 Ind. 407; *Pearson v. Zable*, 78 Ky. 170; *Holt v. Somerville City Council*, 127 Mass. 408; *Shinkle v. Essex Pub. Road Board*, 47 N. J. L. 93; *Brewster v. Syracuse*, 19 N. Y. 116; *People v. Smith*, 21 N. Y. 595; *In re Zborowski*, 68 N. Y. 88; *In re Amsterdam*, 126 N. Y. 158; *Schenectady v. Trustees*, 66 Hun 179, 21 N. Y. Supp. 147; *Caldwell v. Carthage*, 49 Ohio St. 334; *Wilson v. Salem*, 24 Or. 504; *King v. Portland*, 38 Or. 402; *Hennessy v. Douglas County*, 99 Wis. 129.

² *Davidson v. New Orleans*, 96 U. S. 97; *Paulsen v. Portland*, 149 U. S. 30; *Wight v. Davidson*, 181 U. S. 371; *Lyman v. Plummer*, 75 Iowa 358; *Chesapeake & O. R. Co. v. Mullins*, 94 Ky. 355; *Hennepin County v. Bartleson*, 37 Minn. 343; *State v. Pillsbury*, 82 Minn. 359; *Kansas City v. Ward*, 134 Mo. 172; *De Peyster's Petition*, 80 N. Y. 565; *Philadelphia v. Jenkins*, 162 Pa. St. 461. As to the sufficiency of such notice, see *Bellingham Bay & B. C. R. Co. v. New Whatcom*, 172 U. S. 314; *Gilmore v. Hentig*, 33 Kan. 156; *Fairchild v. St. Paul*, 46 Minn. 540; *New Whatcom v. Bellingham Bay Imp. Co.*, 16 Wash. 131;

Jones v. Seattle, 19 Wash. 669. Where a notice is to be given in a paper published in a city, it is immaterial, if published in the city, where it is actually printed. *Rickett v. Hyde Park*, 85 Ill. 110. Under a city charter not providing for notice to the owners of property to be assessed for the opening of a street, a published notice that the city proposes to extend a street is not a sufficient notice to them so as to validate an assessment of damages on lands beyond those bounded by the extended street: *In re Amsterdam*, 55 Hun 270, 8 N. Y. Supp. 234.

³ *Hawthorne v. East Portland*, 13 Or. 271. If, for instance, the statute so requires, the kind of improvement must be expressed definitely in the notice: *Ibid.* If the statute prescribes how notice shall be given, city authorities cannot substitute one of a different character: *Chambers v. Satterlee*, 40 Cal. 497. Where by charter a survey and estimate are filed with the city clerk, such estimate is the basis of the notice, and need not set out the particulars as to the character or cost of the improvement: *Felker v. New Whatcom*, 16 Wash. 178.

⁴ *Merritt v. Portchester*, 71 N. Y. 309, citing *State v. Jersey City*, 25 N. J. L. 309; *Hopkins v. Mason*, 42 How. Pr. 115.

⁵ *Blake v. People*, 109 Ill. 504.

powers is also as imperative here as elsewhere,¹ and therefore the question what rule of apportionment shall be applied, though it might be referred for decision to municipal authorities, cannot be left to merely administrative or ministerial officers.² But the execution of the rule, and the determination of the district, when it is to depend upon facts, is commonly not only with propriety, but of necessity, left to such officers.³

¹ *Murray v. Tucker*, 10 Bush 240.

² An assessment is invalid where the city council, in making the contract, attempted to delegate its authority as to choice of materials, etc., to the street superintendent: *Chase v. Scheerer* (Cal.), 68 Pac. Rep. 768. And see the cases cited *Ibid.* Where a city charter provides that the comptroller shall, on the common council's direction, report to the council an assessment upon the property benefited by an improvement, that the council shall examine and consider the roll, that the council may change or confirm it, and that when so confirmed it shall be deemed conclusively an assessment of the council, these provisions require the council to exercise its judgment, and a mere examination and approval of the roll reported by the comptroller is not sufficient: *White v. Stevens*, 67 Mich. 33. The validity of an assessment for a sewer made by a mayor and aldermen is not affected by the fact that one not a member of the board was called on to assist in making it: *Collins v. Holyoke*, 146 Mass. 298. Where a committee appointed by the council investigated the roll of benefits assessed for a public improvement, the property owners assessed being given a hearing on the confirmation of the roll by the council on the report of the committee, the committee's action is the council's: *Brown v. Saginaw*, 107 Mich. 643. Where a committee may assess benefits by itself or by a committee appointed by it, it may adopt an as-

essment made by a committee not appointed by it: *Bartram v. Bridgeport*, 55 Conn. 122. The adoption by a common council of the report of assessors appointed by it sufficiently complies with the charter requirement that the council make the assessment: *Smith v. Buffalo*, 90 Hun 118, 35 N. Y. Supp. 635.

³ The fact that the exercise of municipal powers of discretion cannot be delegated does not prevent a corporation's appointing committees and investing them with ministerial or administrative duties. The basis of assessment being fixed by statute, the rest is mere measurement: *Dancer v. Mannington*, 50 W. Va. 322. A city council may delegate to a board of public works full authority over the making of a contract for a public improvement: *Rogers v. St. Paul*, 22 Minn. 494. If a city council has power to prescribe the mode in which a special tax shall be assessed, and has ordered the levy and assessment by resolution and directed the city auditor to fix the amount due from each owner according to his frontage, there is no delegation of the power to assess; the auditor's action is merely clerical: *Burlington v. Quick*, 47 Iowa 222. Where the city council ordered a street to be improved, and fixed the assessment districts, the fact that the city engineer had outlined the assessment districts, and that his plan was adopted by the council, did not affect the validity of an assessment made to pay for the improvements: *Davies v.*

Municipal action. Municipalities having no inherent power in these cases, it is necessary to the validity of their action that they keep closely to the authority conferred.¹ Their ordinances and resolutions must be adopted in due form of law,² and they must keep within them afterwards.³ They can

East Saginaw, 87 Mich. 439. A statute was held not void for failing to describe the precise mode by which the superintendent of streets should assess benefits arising from street improvements: *Greenwood v. Morrison*, 128 Cal. 350, citing *Harney v. Benson*, 113 Cal. 314; *O'Rielley v. Kingston*, 114 N. Y. 439.

¹ *Haskell v. Bartlett*, 34 Cal. 281; *Smith v. Cofran*, 34 Cal. 310; *Brock v. Luning*, 89 Cal. 316; *Kelso v. Cole*, 121 Cal. 121; *Bacon v. Savannah*, 91 Ga. 500; *Spaulding v. Baxter*, 25 Ind. App. 485; *Caldwell v. Rupert*, 10 Bush 179; *Allen v. Portland*, 35 Or. 420; *Oshkosh City R. Co. v. Winnebago County*, 89 Wis. 435. Park commissioners, a municipal corporation, need not, in a proceeding for the confirmation of a special assessment by them for improving a street, show that they observed all the steps required by the statute in taking jurisdiction over the street: *Bass v. South Park Com'rs*, 171 Ill. 370; *Aldis v. South Park Com'rs*, 171 Ill. 424; *Royal Ins. Co. v. South Park Com'rs*, 175 Ill. 491.

² See *Bacon v. Savannah*, 91 Ga. 500; *Lindsay v. Chicago*, 115 Ill. 120;

Carlyle v. Clinton County, 140 Ill. 512; *East St. Louis v. Albrecht*, 150 Ill. 510; *Thaler v. West Chicago Park Com'rs*, 174 Ill. 211; *Merritt v. Kewanee*, 175 Ill. 537; *Pells v. Paxton*, 176 Ill. 318; *Connecticut Mut. L. Ins. Co. v. Chicago*, 185 Ill. 148; *Clarke v. Chicago*, 185 Ill. 254; *Petition of De Pierris*, 82 N. Y. 243; *Matter of Metropolitan Gas-Light Co.*, 85 N. Y. 526; *Chamberlain v. Cleveland*, 34 Ohio St. 551. The Illinois cases above cited insist upon the necessity of a valid ordinance as the foundation for an improvement by special assessment or special taxation, and hold that there can be no assessment for a public improvement where the contract was made and work begun before an ordinance authorized it. So in *Partidge v. Lucas*, 99 Cal. 519, it was held that an assessment which included the cost of work not embraced in a resolution of intention is wholly void. And where viewers were appointed before the council passed any ordinance or took any action indicating a determination to make an assessment according to benefits, such appointment and the proceedings thereunder were

³ A contract for an improvement need not, in California, include the whole work embraced in the resolution providing for it; this is matter of discretion: *Emery v. San Francisco Gas Co.*, 31 Cal. 240. But a city council, after ordering a certain improvement as an entirety, cannot accept performance of a part and compel payment therefor, while dispensing with the rest: *Henderson v. Lambert*, 14 Bush 24. That a public work

has not been extended as far as contemplated by the ordinance does not render the assessment invalid, but abutting owners can merely ask that the amount of cost be properly reduced: *Kelly v. Chadwick*, 104 An. 719. Where an ordinance authorized paving and guttering only, but the assessment was for paving, guttering, and grading, such assessment was void: *McClellan v. District of Columbia*, 7 Mackey 93.

bind the taxpayers only in the mode prescribed, and can substitute no other.¹ Their legislative action, if properly taken, is conclusive of the propriety of the proposed improvement,

fatally defective, and could not be cured by passing, subsequently, a proper ordinance: *Scranton v. Barnes*, 147 Pa. St. 461. Where the statute was that no vote should be taken in either board of the common council upon the passage of a resolution or ordinance contemplating a special improvement or levying a tax or assessment until after three days' publication of notice, it was held that each board must give the notice for itself: *Petition of De Pieris*, 82 N. Y. 243. An assessment is not void because the order for it in the city council did not have the several readings required by the rules of that body, since it may waive compliance with its own rules: *Holt v. Somerville*, 127 Mass. 408. Journal's omission to show, as required by the statute, the names of the members and how each voted on a yea and nay vote, held fatal to the validity of an ordinance adopted by a city council: *Pickton v. Fargo* (N. D.), 88 N. W. Rep. 90. Where the statute required the ordinance to be passed with "the unanimous consent of the mayor and aldermen in council," and it purported to be passed "by the mayor and board of councilmen," held that unanimous consent was to be understood, nothing to the contrary appearing of record: *Lexington v. Headley*, 5 Bush 508. (The record showed an affirmative vote of all the aldermen, but was silent as to the mayor, although he signed the proceedings.) Compare *Hoyt v. East Saginaw*, 19 Mich. 39. Where the statute permitted the improvement of a street and an assessment of expense on the owners fronting thereon, on a petition therefor in writing, by the owners of the

larger part of the ground between the points to be improved, provided that the council, by a vote of all the members elect, might order such improvement without such petition, held that an ordinance not passed by the vote of all, in the absence of such a petition, was invalid: *Covington v. Casey*, 3 Bush 698. An improvement is not ordered when bids are merely advertised for, and therefore if the city's power is taken away with a saving of cases in which improvements are already ordered, further proceedings cannot be taken in the case: *Wardens v. Burlington*, 39 Iowa 224. On the point what is a sufficient ordering of the work, see *Wright v. Boston*, 9 Cush. 233; *State v. New Brunswick*, 30 N. J. L. 395. The city council's final order directing an estimate for street improvements controls, although the council may have made an intermediate order refusing it: *Taber v. Ferguson*, 109 Ind. 237.

¹ *Covington v. Worthington*, 88 Ky. 206; *Stebbins v. Kay*, 123 N. Y. 31. Where the city charter provides that "whenever the common council shall determine that it is necessary to construct" a sewer, it shall cause plans and specifications to be made and filed, and bids are then to be advertised for, an assessment for the construction of a sewer the necessity for which has not been determined previously by the council is invalid: *White v. Stevens*, 67 Mich. 33. Where the statute provides that a lien can be imposed upon land in front of which a street improvement is executed when the specific improvement is required to be done by an ordinance, no lien is imposed by an ordinance which applies generally

and of the benefits that will result, if it covers that subject,¹ but it will not conclude as to the preliminary conditions to any

to any or all streets: *State v. Borough Commission*, 50 N. J. L. 565. If a city charter requires that an ordinance to carry out improvements shall be referred to commissioners of assessments and the city surveyor, a reference to commissioners only is insufficient to make an assessment valid: *State v. Bayonne*, 49 N. J. L. 311. An assessment of the expense of widening and extending a street which was partly incurred without contract or advertisement as required by statute, held invalid: *Warren v. Boston (Mass.)*, 62 N. E. Rep. 951. Where a city charter requires that all contracts for street improvements shall be referred to a committee of the city council, a contract without such reference cannot be made the basis of a lot-owner's liability for an assessment: *Worthington v. Covington*, 82 Ky. 265. If the statute requires a local improvement to be made under a contract let by competitive bidding, an assessment where the work has been done by the day is void, and cannot be recovered: *In re Manhattan R. Co.*, 102 N. Y. 301. See *Baltimore v. Boyd*, 64 Md. 11. An assessment is void if the work is not let to the lowest responsible bidder if the statute requires it: *Brady v. Bartlett*, 56 Cal. 350. See *Matter of Savings Bank*, 55 N. Y. 388; *Blodgett's Petition*, 91 N. Y. 117. Where an ordinance required all contracts for public improvements to be let to the lowest bidder, a committee of the council cannot, when entering into a contract with the lowest bidder for the construction of a sewer, change the terms of the ac-

cepted bid by inserting an additional item therein, and the amount of such item cannot be collected from the abutting owners: *Smith v. Portland*, 25 Or. 297. Where a board of supervisors is required to publish notice of awarding a contract, the board must order the publication: *Donnelly v. Tillman*, 47 Cal. 40; *Himmelman v. Satterlee*, 49 Cal. 387. An ordinance authorizing a local improvement is invalid if it fails to specify, as the statute requires, "the nature, character, locality, and description" of the improvement: *Sterling v. Galt*, 117 Ill. 11; *Kankakee v. Potter*, 119 Ill. 324; *Ogden v. Lake View*, 121 Ill. 422; *Holden v. Chicago*, 172 Ill. 263; *Lusk v. Chicago*, 176 Ill. 207; *Jacobs v. Chicago*, 178 Ill. 560; *Dickey v. Chicago*, 179 Ill. 184; *Foss v. Chicago*, 184 Ill. 436; *Kuester v. Chicago*, 187 Ill. 21; *Fehring v. Chicago*, 187 Ill. 416; *Kelly v. Chicago*, 193 Ill. 324; *Beach v. Chicago*, 193 Ill. 369; *People v. Hills*, 193 Ill. 281; *Moll v. Chicago*, 194 Ill. 28; *De Witt County v. Clinton*, 194 Ill. 521. But it is sufficient if words of description are used which have a definite and well-defined meaning in the locality: *Levy v. Chicago*, 113 Ill. 650. And see further as to this requirement, *Springfield v. Malthus*, 104 Ill. 88; *Pearce v. Hyde Park*, 126 Ill. 287; *Springfield v. Sale*, 127 Ill. 359. It is held in Indiana that a city council's resolution directing street improvements and establishing in general terms grades, etc., is not bad for indefiniteness if reducible to a certainty by reference to other sources: *Taber v. Ferguson*, 109 Ind.

¹ *Bacon v. Savannah*, 105 Ga. 62; *Moore v. People*, 106 Ill. 376; *McChesney v. Chicago*, 171 Ill. 253; *Pearson v. Zable*, 78 Ky. 170; *Ludlow v.*

Trustees, 78 Ky. 357; *Baltimore v. Boyd*, 64 Md. 10; *Davies v. Saginaw*, 87 Mich. 439; *Shimmons v. Saginaw*, 104 Mich. 511.

action at all;¹ such, for example, as that there shall be in fact such a street as they undertake to provide for the improvement of,² or that the particular improvement shall be petitioned for or assented to by a majority or some other defined proportion

227. And such an ordinance need not describe the improvement in detail. It is sufficient if it gives a general description as to the plan of work: *Taber v. Grafmiller*, 109 Ind. 206. It is held in California that the resolution of intention to make a street improvement must intelligently describe the work to be done in all and each of its material parts; and a failure of description in any material part of the work vitiates the resolution as a whole, and avoids any contract and any assessment based thereon: *Bay Rock Co. v. Bell*, 133 Cal. 150; *McDonell v. Gillon* (Cal.), 66 Pac. Rep. 314. As to specification of grade, in ordinance or resolution ordering an improvement, see *White v. Alton*, 149 Ill. 626; *Haley v. Alton*, 152 Ill. 113; *Parker v. La Grange*, 171 Ill. 344; *Claffin v. Chicago*, 178 Ill. 549; *Brewster v. Peru*, 180 Ill. 124; *Ronan v. People*, 193 Ill. 631; *Craig v. People*, 193 Ill. 199; *Job v. People*, 193 Ill. 609; *Higgins's Estate v. People*, 193 Ill. 394. Where statutory provisions have been disregarded in the construction of a local improvement, the fact that the cost was not thereby increased does not authorize the assessment of the expenses so illegally incurred on the property benefited: *Warren v. Boston* (Mass.), 62 N. E. Rep. 951.

¹ A city, in a suit to enforce a special assessment, has the burden of showing performance of the conditions precedent: *Lufkin v. Galveston*, 56 Tex. 522.

² *Baltimore v. Hook*, 62 Md. 371; *Touzalín v. Omaha*, 25 Neb. 817; *Philadelphia v. Ball*, 147 Pa. St. 243. A city cannot proceed to levy an assessment for a street or sewer until it

obtains an easement for the purpose: *Leavenworth v. Lang*, 6 Kan. 274; *Lorenz v. Armstrong*, 3 Mo. App. 574; *Matter of Rhineland*, 68 N. Y. 105. And there is no easement if the proceedings to obtain it were void as to any of the lot-owners: *Bush v. Detroit*, 32 Mich. 43. A statute authorizing assessments for sewers "in streets" was held to mean public streets; but the laying out of a private way as a public street before the building of a sewer therein rendered the assessment valid: *Bishop v. Tripp*, 15 R. I. 466. It was held in *Holmes v. Hyde Park*, 121 Ill. 128, followed in *Hunerberg v. Hyde Park*, 130 Ill. 155, and *Leman v. Lake View*, 131 Ill. 388, that a person specially assessed for the expense of grading and paving a street in an incorporated village could not set up against the confirmation of the assessment that the village had not acquired title to the soil of the street. See *Jackson v. Smith*, 120 Ind. 520; *Mason v. Sioux Falls*, 2 S. D. 640. As to highway's becoming impressed with character of city street, so as to sustain assessment after annexation of territory to city, see *McGrew v. Stewart*, 51 Kan. 185. The fact that part of a sewer's length ran through private property, the owners of which had not consented thereto, did not, it was held in *Johnson v. Duer*, 115 Mo. 366, relieve the property owners from paying for that part of the sewer which ran through the public streets. The objection to a street assessment that the grade of a certain crossing outside the work ordered to be done had been fixed was held untenable in *Warren v. Russell*, 129 Cal. 381.

of the parties concerned. This last provision is justly regarded as of very great importance, and a failure to observe it will be fatal at any stage in the proceedings.¹ And any decision or

¹ *Dyer v. Miller*, 58 Cal. 585; *Mulligan v. Smith*, 59 Cal. 206; *Keese v. Denver*, 10 Colo. 112; *Merritt v. Kewanee*, 175 Ill. 537; *Hammond v. Leavitt*, 181 Ill. 416; *Case v. Johnson*, 91 Ind. 447; *Howard v. Bristol*, 8 Bush 493; *Steuart v. Baltimore*, 7 Md. 500; *Henderson v. Baltimore*, 8 Md. 352; *Howard v. First Independent Church*, 18 Md. 451; *Twiss v. Port Huron*, 63 Mich. 528; *Dennison v. Kansas City*, 95 Mo. 416; *Terhune v. Passaic*, 41 N. J. L. 90; *App v. Stockton*, 61 N. J. L. 520; *Sharp v. Speir*, 4 Hill 76; *Fass v. Seehawer*, 60 Wis. 525. See *Whiteford v. Probate Judge*, 53 Mich. 130. It was held in *Buchan v. Broadwell*, 88 Mo. 31, that a provision in a city charter authorizing assessments against all abutters where a street is graded, on the petition of a majority in frontage of resident abutters, does not unconstitutionally discriminate against the non-resident abutters. Where two intersecting streets were to be paved, a petition signed by a majority of the total abutting property on both streets was insufficient: *Bloomington v. Reeves*, 177 Ill. 161. Property owners whose property will be charged by the establishment of a paving district are entitled to insist that the several petitioners sign in such a way as to be fully and legally bound, and no signatures which do not so bind the owners of the property purporting to be affected thereby may be counted in passing upon the validity of such a petition: *Batty v. Hastings (Neb.)*, 88 N. W. Rep. 139. A lessee in possession under a lease of land for ninety-nine years, renewable forever, the property standing in his name for taxation, is so far owner that he may

subscribe a petition for street improvement, and in such case the lessor's signature is not needed to authorize an assessment against the *corpus* of such property: *St. Bernard v. Kemper*, 60 Ohio St. 244. One joint owner cannot bind his co-tenant by signing a petition: *Mulligan v. Smith*, 59 Cal. 206. Executors and administrators are not entitled to petition for an improvement as "owners:" *Mulligan v. Smith*, 59 Cal. 206. As to petition signed by an agent for property owners, see *Gleason v. Barnett (Ky.)*, 61 S. W. Rep. 20. Where an owner unites with others in a petition for an improvement, stating the number of feet his property abuts on the street, he is estopped, after the assessment has been made, from saying that he has a less number of feet subject to assessment: *Cincinnati v. Mauss*, 54 Ohio St. 257. A lot-owner cannot be assessed for a public improvement more than the maximum rate fixed in the petition of property holders as the cost of the improvement: *Barber Asphalt Paving Co. v. Watt*, 51 La. An. 1345. Where the power to make an improvement is derived from a petition of the property owners, the work, to sustain an assessment, must be done according to the petition: *Hutchinson v. Omaha*, 52 Neb. 345. One who petitions for an improvement is not estopped from denying the validity of the assessment on the ground that the statute was not complied with in making the improvement: *McLauren v. Grand Forks*, 6 Dak. 397; *Strout v. Portland*, 26 Or. 294. Where the board of local improvements has power to originate a scheme for a local improvement to be paid for by

certificate of the proper authorities, that the requisite application or consent had been made, would not be conclusive, but might be disproved.¹ The intervention of a jury is not matter of constitutional right in any stage of the proceedings in laying an assessment, except as in express terms it may be provided for,² as sometimes it is, and then it cannot be dispensed with.³ If, observing all conditions precedent, the municipal authorities keep within their lawful authority, all intendments

special assessment or special tax, either with or without a petition, the validity of a special assessment for paving is not affected by the fact that the pavement laid was of a kind different from that petitioned for by the property owners: *Rawson v. Chicago*, 185 Ill. 87.

¹*Bloomington v. Reeves*, 177 Ill. 161; *Cummings v. West Chicago Park Com'rs*, 181 Ill. 136; *McManus v. People*, 183 Ill. 391; *Sharp v. Speir*, 4 Hill 76; *Allen v. Portland*, 30 Or. 420. The rule in New York is otherwise now by statute: *Matter of Kiernan*, 62 N. Y. 457. In *Henderson v. Baltimore*, 8 Md. 352, where the statute required the assent in writing of a majority of proprietors of land fronting on the street, before the paving of the street could be ordered, it was held that the assent must appear in fact to have been given; that the certificate of the commissioners that the requisite number of proprietors had assented was only a *prima facie* warrant of authority and those who should act under it would do so at their peril. Where a petition of a majority of owners of lots fronting on a proposed improvement is necessary to set in motion the machinery of the statute authorizing the improvement, one whose land is sold for non-payment of an assessment for benefits may show, in ejectment to recover back land, that petition was not signed by the requisite majority, although the county court ordered the improvement on the

basis of the petition as presented. *Zeigler v. Hopkins*, 117 U. S. 683. See *Auditor-General v. Fisher*, 84 Mich. 128. The burden of showing that a majority of the frontage did not petition is on those objecting to the proceedings: *Dashiell v. Baltimore*, 45 Md. 675. As to the evidence admissible to determine the question of majority, see *Mulligan v. Smith*, 59 Cal. 206. And for a peculiar case, see *Dough v. Harrison*, 54 Cal. 428. As to when the objection that a majority has not signed should be interposed, see *Pipher v. People*, 183 Ill. 436; *Leitch v. People*, 183 Ill. 569.

²*Davis v. Litchfield*, 155 Ill. 384; *Chapin v. Worcester*, 124 Mass. 464; *Cleveland v. Tripp*, 13 R. I. 50; *Bishop v. Tripp*, 15 R. I. 466.

³*Campau v. Detroit*, 14 Mich. 276. Where the statute requires assessments to be made by freeholders chosen by the concurrent action of the city and the property owner, the assessment is invalid if made by persons not freeholders and without notice to the owner of their appointment: *Greensborough v. McAdoo*, 112 N. C. 359. It was held in *Borgman v. Detroit*, 102 Mich. 261, that the fact that the value of the property condemned by a city under a statute providing for a jury of twelve to determine the value of the property, was by stipulation determined by eleven jurors, did not invalidate the special assessment tax levied to pay therefor.

will favor their action.¹ A city which has commenced proceedings and finds them irregular may retrace the steps and vacate the action.²

It is customary to provide for an assessment by the same act or resolution which provides for the work for which the assessment is to be made; but this is not indispensable unless made so by positive law; and an improvement may be made and the assessment for the expense provided for afterwards.³ It is competent also to provide for a second assessment if the first

¹ Brady's Petition, 85 N. Y. 268; In re Bassford, 50 N. Y. 509. If one denies that he is benefited by an improvement for which he is charged, the burden is upon him to show it: Brown v. Denver, 3 Colo. 169. One who resists payment of an assessment certificate appearing to be regular and valid has the burden of showing that it is invalid: Tuttle v. Polk, 92 Iowa 433. The burden of showing an assessment to be excessive is upon those who contest it: Bigelow v. Boston, 120 Mass. 326. A taxpayer who seeks to avoid an assessment on the ground of fraud and collusion between the municipal officers and contractor has the burden of proving that an unauthorized charge was imposed on his property: Seaboard Nat. Bank v. Woester, 147 Mo. 467. The presumption being in favor of the validity of a special tax, the burden of showing the contrary is on the owner: Auditor-General v. Maier, 95 Mich. 127. Where the owner of a lot institutes an action to have declared void special taxes assessed against it, the burden is upon him to establish the invalidity of the tax: Lasbury v. McCague, 56 Neb. 220. In the absence of proof to the contrary, street assessment proceedings will be presumed to be regular, and if irregularities appear the burden is on the person attacking the assessment to show that he has been prejudiced thereby: Lyth v. Buffalo, 48 Hun 175. One who

attacks an assessment levied for municipal improvement has the burden of showing that the council had no jurisdiction to make it: Allen v. Portland, 35 Or. 420.

² Matter of Buffalo, 78 N. Y. 362. As to what are substantial failures to comply with the law, see Matter of Anderson, 60 N. Y. 467; Beniteau v. Detroit, 41 Mich. 116.

³ Petition of Roberts, 81 N. Y. 62. It was held in Sanborn v. Mason City, 114 Iowa 189, that a special assessment for the construction of a sewer could not be levied and collected in advance of the completion of the sewer: and it was said that it had long been the policy in Iowa "not to exact the payment of assessments for local or special improvements, such as street paving, gutters, and the like, as distinguished from those of the entire municipality before their completion." In Bellevue Imp. Co. v. Bellevue, 39 Neb. 876, an assessment for a sidewalk made before the walk's completion or the ascertainment of its cost was held void. Where some of the owners contract on their own behalf to make a part of a desirable improvement, an assessment may be laid on the others for the rest: Chicago v. Sherwood, 104 Ill. 549. See People v. Chapman, 128 Ill. 496; Beck v. Obst, 12 Bush 268; In re East Eighteenth St., 142 N. Y. 645; Philadelphia v. Odd Fellows' Hall Assoc., 168 Pa. St. 105.

proves insufficient; but express statutory authority would be needed for this purpose.¹ Any notice to contractors required to be given by statute must be sufficiently full in its particulars to give the requisite information to enable them to bid intelligently, since otherwise the purpose of the statute in requiring

¹*Hagar v. Supervisors*, 51 Cal. 474; *Tingue v. Port Chester*, 101 N. Y. 294. As to what is a second assessment, see *Harris v. Supervisors*, 49 Cal. 662. In Indiana the statute authorizes the board of commissioners to levy an additional assessment upon lands benefited by the improvement of a public road, when the original assessment has proved insufficient: *Board of Com'rs v. Fullen*, 111 Ind. 410; *Rogers v. Voorhees*, 124 Ind. 469; *Goodwin v. Board of Com'rs*, 146 Ind. 164; *Kline v. Board of Com'rs*, 152 Ind. 321. Where local improvements have been made under a valid ordinance providing for a special assessment, successive proceedings in pursuance of such ordinance may be authorized until full payment for benefits to abutting property has been secured: *West Chicago Park Com'rs v. Sweet*, 167 Ill. 326. Under a statute authorizing additional assessments for drainage purposes where a prior assessment has proved inadequate, a re-assessment to reimburse the drainage commissioners for moneys advanced by them to pay the excess of the expense of the district's work above the amount of the first assessment is not authorized: *Ahrens v. Minnie Creek Drainage Dist.*, 170 Ill. 262. Distribution of a supposed deficiency arising from a reduction in an assessment for benefits cannot be ordered until it appears that the total assessment after the reduction will not suffice to complete the improvement: *Jacksonville v. Hamill*, 178 Ill. 235. As to the levy of additional assessments for building a levee, see *Lovell v. Sny Island Levee Drainage Co.*, 159 Ill. 188. In California it is held that under a statute providing that if there should be a deficiency in the assessment for opening a street, or if for any cause it should appear desirable, the council may order a supplemental assessment, a second supplemental assessment is authorized where a deficiency has occurred: *Gill v. Oakland*, 124 Cal. 335. Under the Washington statute there can be but one re-assessment for municipal improvements; if a re-assessment is insufficient to pay improvement warrants with interest, the city is liable for the deficiency: *Philadelphia Mortgage, etc. Co. v. New Whatcom*, 19 Wash. 225. A proceeding to re-assess lands for the improvement of a highway is not one for the recovery of money by the county, and, therefore, is not subject to the six-year statute of limitations: *Kline v. Board of Com'rs*, 152 Ind. 321. The only limitation as to time within which a certain city could make a re-assessment where judgment on the original assessment has been denied is such lapse as would show waiver or abandonment: *State v. District Court*, 68 Minn. 242. The machinery for levying and collecting a second assessment is substantially the same as that provided for levying and collecting the original assessment: *Board of Com'rs v. Fullen*, 111 Ind. 410. Where, on objections to a special assessment, the court reduces the assessment on certain property without increasing the other assessments, so that the sum raised is too small, the municipality cannot, upon a supplemental assessment to meet the deficiency, have

it would be defeated.¹ Sometimes an option is given to the person assessed to make his portion of the improvement himself; but when this is done it is mere matter of favor, and the same strictness in notice might not be required as in establishing a claim against him.²

The fact that a railroad company, or a plankroad or turnpike company, has an easement in a public street of a permanent nature, and the right to occupy it for the corporate purposes, does not preclude the street's being improved at the expense of adjoining property. It still remains a public street, and subject to the same right of control as before, except as the right is qualified by the easement granted to the private corporation.³ But the authorities generally hold that an abutting owner is not subject to assessment for the cost of paving such part of the street as a railroad company is obliged to pave or keep in repair.⁴

any part of such deficiency assessed upon such property: *Greeley v. Cicero*, 148 Ill. 632. On a supplemental assessment for a deficiency the court record in the original assessment is admissible to show the adjudication that certain property was then assessed for its fair proportion of the improvement: *Wickett v. Cicero*, 152 Ill. 575.

¹ See *Stockton v. Clark*, 53 Cal. 82; *Stockton v. Skinner*, 53 Cal. 85; *Baltimore v. Johnson*, 62 Md. 225. Where the statute requires notice inviting sealed proposals to be conspicuously posted in a certain public office for four days, this means that it be kept posted for the full business hours of the four days: *Himmelman v. Cahn*, 49 Cal. 285; *Brooks v. Satterlee*, 49 Cal. 289. Under a statute requiring notice of proposals for a public improvement to state the extent of the work, etc., a notice not stating as nearly as possible the extent of the work, when it is to be done, or at what time the proposals are to be acted upon, is insufficient: *Windsor v. Des Moines*, 101 Iowa 343.

² Where the statute requires notice to the owner, and entitles him to an opportunity to do the work himself, and notice is not given, the assessment is void; *Horback v. Omaha*, 54 Neb. 83; *Locker v. South Amboy*, 62 N. J. L. 197; *Folsinbee v. Amsterdam*, 142 N. Y. 118. See *Lasbury v. McCague*, 56 Neb. 220. A notice to a lot-owner to construct a sidewalk must strictly comply with the statute: *Simmons v. Gardner*, 6 R. I. 255. Notice by publication is sufficient: *Fass v. Seehawer*, 60 Wis. 525.

³ *Bagg v. Detroit*, 5 Mich. 336; *State v. Atlantic City*, 34 N. J. L. 99. And see *Parker v. Atchison*, 48 Kan. 574; *State v. New Brunswick*, 34 N. J. L. 395; *Richards v. Cincinnati*, 31 Ohio St. 506.

⁴ *McFarlan v. Chicago*, 185 Ill. 242; *State v. Common Council*, 138 Ind. 455; *Shreveport v. Prescott*, 51 La. An. 1895; *Philadelphia v. Spring Garden, etc. Co.*, 161 Pa. St. 522; *Philadelphia v. Bowman*, 166 Pa. St. 393. See *Davies v. Saginaw*, 87 Mich. 439; *State v. District Court*, 80 Minn. 293.

Proceedings in assessment. These differ too much in different states, and even in the same state for different cases, to admit of any attempt to give them here in detail. We must therefore content ourselves with stating general principles. The most fundamental and imperative of these is that the statute authorizing an improvement must be strictly pursued; not, indeed, with absolute literalness, but in all important particulars. The observance of every one of the substantial requirements must be regarded as a condition precedent to any valid assessment;¹ none of the steps prescribed can be regarded as

But it was held in *Gilmore v. Utica*, 121 N. Y. 561, that an assessment for repairing a street, under a statute which provided that one-third of the expense should be borne by the city at large, and two-thirds by the abutting owners, was not invalidated by the fact that a street railroad company occupying the street was not required to defray the expense of repaving the space devoted to its use, as it might, under the city charter, have been required to do. And in *Springfield v. Weaver*, 137 Mo. 650, it was held that failure to compel a railroad company to pay for paving between the rails did not invalidate the tax against the abutting owners for work actually done.

¹ *Lyon v. Alley*, 130 U. S. 177; *Himmelmann v. McCreery*, 51 Cal. 562; *Brady v. King*, 53 Cal. 44; *Buckman v. Cuneo*, 103 Cal. 62; *Schwiesau v. Mahon*, 110 Cal. 543; *Warren v. Chandos*, 115 Cal. 382; *Witter v. Bachman*, 117 Cal. 318; *Ede v. Cuneo*, 126 Cal. 167; *San Diego Inv. Co. v. Shaw*, 129 Cal. 273; *McLauren v. Grand Forks*, 6 Dak. 397; *Ware v. Jerseyville*, 158 Ill. 234; *Hoover v. People*, 171 Ill. 182; *Payson v. People*, 175 Ill. 267; *Vennum v. People*, 188 Ill. 158; *Holland v. People*, 189 Ill. 348; *Biggins's Estate v. People*, 193 Ill. 601; *Nevins, etc. Drainage Co. v. Alkire*, 36 Ind. 189; *Coyington v. Casey*, 3 Bush 698; *Barker v. South-*

ern Construction Co. (Ky.), 47 S. W. Rep. 608; *Barber Asphalt Co. v. Watt*, 51 La. An. 1345; *Henderson v. Baltimore*, 8 Md. 352; *Jones v. Boston*, 104 Mass. 461; *Warren v. Grand Haven*, 30 Mich. 24; *Grand Rapids v. Blakely*, 40 Mich. 367; *Smith v. Omaha*, 49 Neb. 883; *Ives v. Irey*, 51 Neb. 136; *Hutchinson v. Omaha*, 52 Neb. 345; *Equitable Trust Co. v. O'Brien*, 55 Neb. 735; *Grant v. Bartholemew*, 58 Neb. 839; *Casey v. Burt County*, 59 Neb. 624; *Medland v. Linton*, 60 Neb. 249; *Batty v. Hastings (Neb.)*, 88 N. W. Rep. 139, and cases cited; *State v. Jersey City*, 42 N. J. L. 575; *Sharp v. Speir*, 4 Hill 76; *In re Astor*, 50 N. Y. 363; *In re Cameron*, 50 N. Y. 502; *Robinson v. Logan*, 31 Ohio St. 466; *Allen v. Portland*, 35 Or. 420; *Spokane Falls v. Browne*, 3 Wash. St. 84; *Buckley v. Tacoma*, 9 Wash. 253; *Liebermann v. Milwaukee*, 89 Wis. 336; *Oshkosh City R. Co. v. Winnebago County*, 89 Wis. 435; *Sanderson v. Herman*, 108 Wis. 662. Under a statute providing that before any contract for street improvements is made a preliminary assessment is to be made by the board of public works and reported to the common council for confirmation, a preliminary assessment before the contract is let is essential to the validity of an assessment to pay for the improvement: *State v. Ashland*, 88 Wis. 599. Where an act provid-

directory merely.¹ Where, therefore, the commissioners for such an improvement are required to take an oath faithfully and fully to discharge their duties, and they fail to take it or take a different one, their proceedings are illegal and void.² So if they are required to give notice of any particular step in the proceedings, a notice to the effect and for the time prescribed is indispensable.³

ing for local improvements required the certificate of the commissioners of public works as to the amount of expense paid or actually incurred by the city, as the basis of the assessment, it was held that nothing could be the substitute for this. The surveyor's affidavit cannot be received: *Cameron's Petition*, 50 N. Y. 502. Under a statute providing that the assessment roll shall contain a valuation of the property assessed, a special assessment for grading and paving a street will not be enforced when it appears that no valuation has been made: *Beidler Manuf. Co. v. Muskegon*, 63 Mich. 44. Where a city has neglected to take the necessary steps to render valid assessments against property benefited by local improvements, it cannot enforce such assessments on the ground of benefits received by the land-owners: *Buckley v. Tacoma*, 9 Wash. 253. Though acts which the statute requires to be performed before making a public improvement are conditions precedent to the power to levy a tax on the property owners, only a substantial compliance with the statute is required: *Gill v. Dunham* (Cal.), 34 Pac. Rep. 68.

¹ *Grau v. Board of Health*, 135 Mass. 490; *Merritt v. Portchester*, 71 N. Y. 309. Where an ordinance gives the owners of the majority of the frontage a right to determine the material to be used, they waive their right unless they give notice of their choice: *Moale v. Baltimore*, 61 Md. 224. The property owner's vested

right to be assessed according to the method in force when the work is ordered can extend only to the amount and time of payment, and he cannot complain of a change in the method which does him no injury in these respects: *Spokane v. Browne*, 8 Wash. 317.

² *Merritt v. Portchester*, 71 N. Y. 309. Commissioners need not be re-sworn on recasting their assessment: *Schemick v. Chicago*, 151 Ill. 336. Commissioners appointed to make the assessment for a local improvement are incompetent to impeach their own report by showing that no oath was taken by them: *Ryder's Estate v. Alton*, 175 Ill. 94.

³ *Himmelmänn v. Cahn*, 49 Cal. 285; *Derby v. West Chicago Park Com'rs*, 154 Ill. 213; *Taber v. Ferguson*, 109 Ind. 227; *Davis v. Lake Shore & M. S. R. Co.*, 114 Ind. 364; *Grace v. Board of Health*, 135 Mass. 490. The publication of the time and place of hearing objections to the report of the commissioners must conform strictly to the requirements of the charter: *State v. Bayonne*, 49 N. J. L. 311. Notice by drainage commissioners to highway commissioners requisite where highway is to be benefited by drain: *Highway Com'rs v. East Lake Fork Drainage Dist.*, 127 Ill. 581. Notice of meeting to hear objections to additional assessment, necessary: *Wells County v. Gruner*, 115 Ind. 224. Publication of notice signed by three persons, one of whom is not one of the three commissioners appointed, held in-

Estimating benefits. It has been said that, in assessing benefits, the only safe and practicable course, and the one which will do equal justice to all parties, is to consider what will be the influence of the proposed improvement on the market value of the property; what the property is now fairly worth in the market, and what will be its value when the improvement is made.¹ A test of this character should be applied by

sufficient: *McChesney v. People*, 148 Ill. 221; *Boynton v. People*, 155 Ill. 66. Where the statute was silent as to the length of notice necessary in levying assessments for a sewer when personal service is had, a notice of ten days to a resident landowner was held sufficient: *Auburn v. Paul*, 84 Me. 212. Under a statute providing that special assessment commissioners shall mail notices to the property owners, and shall cause at least ten days' notice to be given by posting notices, but which does not expressly say when the former notices shall be mailed, such notices must be mailed at least ten days before the first day of the term at which the assessment roll is to be returned: *Perry v. People*, 155 Ill. 307. If notice of an assessment for a municipal improvement is required to be given to each owner known to any one of the commissioners, a notice to those known by one commissioner only is sufficient: *Murfey v. Peoria*, 119 Ill. 509. Where commissioners give notice that they will meet at a specified hour on a day named, the assessment need not show the hour they met, or that the assessment was made at the hour named: *Aldis v. South Park Com'rs*, 171 Ill. 424. The validity of a notice by a city of a street improvement is not affected as to property taxable therefor by the fact that in a second publication it includes an additional improvement not affecting such property: *Felker v. New Whatcom*, 16

Wash. 178. Under a statute requiring special assessment commissioners to file an affidavit "stating that they have sent, or caused to be sent, by mail, to the owners whose premises have been assessed, and whose names and places of residence are known to them," a certain notice, such affidavit need not state the names of the persons to whom the notice was sent: *Linck v. Litchfield*, 141 Ill. 469. Irregularity in service of notice waived by appearance: *Gregory v. Ann Arbor*, 127 Mich. 454. Legal defect in the notices of the filing of commissioners' report not cured or waived by appearance of party who thereupon objects because of such defect: *State v. Bayonne*, 51 N. J. L. 428. Collateral attack, when not allowed: *Montgomery v. Wasem*, 116 Ind. 343; *Johnson v. State*, 116 Ind. 374. Presumption of notice and burden of proof: *Hellman v. Shoulters*, 114 Cal. 136; *Brown v. Chicago*, 117 Ill. 21; *Taber v. Ferguson*, 109 Ind. 227. After notice of commissioners' meeting the property owners are required to take notice of all succeeding steps in the proceedings, and notice of a special assessment, or of the making and filing of the assessment roll, is not necessary: *People v. Chapman*, 127 Ill. 387.

¹ *Bronson, J.*, in *Matter of Furman St.*, 17 Wend. 568, cited with approval in *State v. Newark*, 35 N. J. L. 157, 167. It is immaterial what system the commissioners adopt in making the assessment, provided they do not assess any property more than it is

the legislature before establishing any arbitrary rule of assessment; such, for instance, as one which measures benefits by the length of frontage. There can be no justification for any proceeding which charges the land with an assessment greater

benefited, or more than its just proportion of the cost of the improvement: *Pike v. Chicago*, 155 Ill. 656. A suggestion that assessors have acted on an erroneous principle is not tenable, the matter being referred to their judgment: *Cruger's Petition*, 84 N. Y. 619, citing *Matter of Eager*, 46 N. Y. 100. The apportionment of benefits among landowners in the district cannot be by any fixed rule, but must be in proportion to the benefits accruing to each piece of land, and in this connection not only values, but also needs, necessities, and advantages are to be considered: *Grand Rapids School Furn. Co. v. Grand Rapids*, 92 Mich. 564. In fixing the amount of local assessments the legislature is not limited to the actual increase in value of the property assessed, resulting from the local improvement: *Rolph v. Fargo*, 7 N. D. 640; *Webster v. Fargo*, 9 N. D. 208. In making assessments for repairing sewers the value of the potential use of a sewer to adjoining proprietors may be considered: *Hunter's Appeal*, 71 Conn. 189. Under the New Jersey statutes when the benefit resulting from a sewer is prospective and depends upon the construction of lateral and connecting sewers not yet built, the benefits from existing sewers are to be determined and assessed when the assessment is made upon the property sewered and benefited by such existing sewers, but such assessments become liens and draw interest only from the date of the confirmation of the assessment for the connecting sewer: *Vreeland v. Bayonne*, 60 N. J. L. 168. All natural and probable results to flow from a local assessment such as the opening

of a street may be considered in estimating the benefits, but none can be assessed for improvements — for example, a bridge — not provided for: *Hutt v. Chicago*, 132 Ill. 352. The benefits to be assessed to adjoining property for the paving of a street must be confined to those arising from the particular improvement, and cannot be based on the assumption that other improvements not provided for will be made on the street before it is paved: *Holdom v. Chicago*, 169 Ill. 109. See *Title Guarantee, etc. Co. v. Chicago*, 162 Ill. 505. The fact that land is rendered more healthy by an improvement made by the town may be considered in assessing a betterment upon land, although there is a similar benefit to other real estate in the neighborhood: *Beals v. Brookline*, 174 Mass. 1. That some of the improvements are incidentally beneficial to other streets furnishes no reason for reducing the assessment against persons owning property in the improved neighborhood: *Bacon v. Savannah*, 105 Ga. 62. The benefits arising from the situation of the premises with reference to a change of grade, such as having a dry and pleasant street in front, and more convenient access to a store, are direct and special, and must be set off against the damages, though other estates on the same street may be benefited in like manner: *Chase v. Portland*, 86 Me. 367. Lots damaged by a change of grade in front of them are chargeable only with the special benefits arising from such change, not with any share in the general benefit to them and others: *Smith v. St. Joseph*, 122 Mo. 643. The special benefit which may be set off

than the benefits; it is a plain case of appropriating private property to public uses without compensation.¹ It is conceded that the legislative judgment, that a certain district is or will be so far specially benefited by an improvement as to justify

against the damages to abutting property from a change of grade in a street is the increased value of the property became of the improvement, rather than that which arises to other adjacent property: *Barr v. Omaha*, 42 Neb. 341. Assessments for repairing a drain are to be assessed in proportion to benefits received therefrom, and not merely in proportion to the amount assessed from the construction of the drain: *Parke County Coal Co. v. Campbell*, 140 Ind. 28. Rule for assessing benefits for artificial drainage to make lands cultivatable: *Blue v. Wentz*, 54 Ohio 247. See *Holley v. Orange County*, 106 Cal. 420. In a proceeding for the confirmation of a special assessment for a street improvement, evidence as to whether, and the extent to which, certain lots were increased in value by the proposed improvement was held admissible, as, if they were so increased, such improvement was a "special benefit," in excess of which a special tax could not be levied: *Fahnestock v. Peoria*, 171 Ill. 454. The burden rests upon the city to show the increase of the market value of lots as the result of opening a street: *Baltimore v. Smith*, 80 Md. 458. Under a Michigan statute it was held not necessary, in apportioning benefits, to have a separate finding of the enhanced values of all the properties in the assessment district: *Grand Rapids School Furn. Co. v. Grand Rapids*, 92 Mich. 564.

¹ *Norwood v. Baker*, 172 U. S. 269, 280; *Palmer v. Danville*, 166 Ill. 42; *Montgomery v. Fullen*, 111 Ind. 410; *Adams v. Shelbyville*, 154 Ind. 467; *McKee v. Pendleton*, 154 Ind. 652;

Duke v. O'Bryan, 100 Ky. 710; *Yeatman v. Crandall*, 11 La. An. 229; *New Orleans v. Drainage Co.*, 11 La. An. 338; *Lincoln v. Street Com'rs*, 176 Mass. 210; *Dexter v. Boston*, 176 Mass. 247; *State v. Pillsbury*, 82 Minn. 359; *Cain v. Omaha*, 42 Neb. 120; *Smith v. Omaha*, 49 Neb. 883; *Matter of Drainage*, 35 N. J. L. 497; *Poillon v. Rutherford*, 47 N. J. L. 439; *Tide Water Co. v. Costar*, 18 N. J. Eq. 518; *Canal Bank v. Albany*, 9 Wend. 244; *Matter of Canal St.*, 11 Wend. 155; *Walsh v. Barron*, 61 Ohio St. 15; *Paulsen v. Portland*, 16 Or. 450; *Hutcheson v. Storrie*, 92 Tex. 685. Only such benefits are to be assessed for widening a street as it is reasonably apparent that the property will receive, and nothing is to be considered a benefit that does not enhance the value of the property: *Friedenwald v. Baltimore*, 74 Md. 116. Under a statute requiring assessments to be made on real estate specially benefited in proportion to the benefits received, an assessment upon lands of the cost and expense of opening a street must show that it was made in proportion to, and not in excess of, the benefits specially conferred thereon by such improvement: *State v. West Hoboken*, 51 N. J. L. 267. It is presumed, in assessing for benefits, that the owners are required to contribute only in proportion to the special benefits: *Medland v. Linton*, 60 Neb. 249. Under the guise of a supplemental assessment a burden greater than the benefits accruing to it from the improvement cannot be imposed upon property: *Greeley v. Cicero*, 148 Ill. 632; *Le Moyne v. Chicago*, 175 Ill. 356; *West Chicago Park*

a special assessment, is conclusive, and that its determination as to what shall be the basis of the assessment is equally conclusive.¹ To invoke the intervention of a court for relief against the results of its conclusion is to invoke the judicial authority to give its judgment controlling effect over that of the legislature, in a matter of the apportionment of a tax, which by concession on all sides is purely a matter of legislation. This is confessedly inadmissible in any case where the legislative action is not manifestly colorable and arbitrary.² If either the rule prescribed for the apportionment, or the assessment made under it, is so grossly and palpably unjust and oppressive as to give demonstration that the proper authority had never determined the case on the principles of taxation, the wrong must always be open to correction. A man's property is not to be taken from him with impunity, and without

Com'rs v. Metropolitan West Side El. R. Co., 182 Ill. 246. Report of arbitrators held to show that they had imposed on the land a burden equal to the benefits: *Essex Public Road Board v. Shinkle*, 49 N. J. L. 65.

¹ *Ante*, p. 1245; *State v. District Court*, 29 Minn. 62; *Leitch v. La Grange*, 138 Ill. 291; *Powers v. Grand Rapids*, 98 Mich. 393; *Cruger's Petition*, 84 N. Y. 619; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Oregon & C. R. Co. v. Portland*, 25 Or. 229. Whether the property within a legislative district will be benefited is a legislative question. Its decision, whether made by the legislature or by some subordinate authority, is in general final, and cannot be contested by individual property owners: *Pearson v. Zable*, 78 Ky. 170. The judgment of assessment commissioners as to the area over which benefits extend, and as to the amount of such benefits, will prevail unless there is very convincing evidence against it: *State v. Newark*, 48 N. J. L. 101, 49 N. J. L. 239.

² Where the general assembly has fixed in what proportion and by what standard the cost of public improve-

ments is apportioned, the judiciary cannot substitute for such standard a judicial standard based on actual benefits received, measured by values established by proof: *Kelly v. Chadwick*, 104 La. 719. Where an assessment is ordered for the cost of a work, it is to be presumed that in the legislative judgment the cost would not exceed the benefits: *Petition of Roberts*, 81 N. Y. 62. For the difference between costs and benefits in these cases, see *Johnson v. Milwaukee*, 40 Wis. 315. A city council's resolution declaring the amount to be assessed on the property in an assessment district under a charter provision is a legal determination that the benefits conferred are equal to that amount, and when the council confirms the assessment roll it thereby determines how much each parcel of land is benefited; and such determination is conclusive, in the absence of fraud or mistake: *Davies v. Saginaw*, 87 Mich. 439. A statute authorizing the assessment of a street railway for paving of streets establishes the basis for such assessment, and the city and company cannot by agreement change the basis so estab-

redress, by simply calling the appropriation an assessment, when it is not such in its elements.¹

When the estimate of benefits is referred to assessors, by whatever name they may be called, the rule of conclusiveness here stated must apply to their action. The remedy of one who considers himself unfairly assessed is to apply for redress to the statutory tribunal, if one is provided with the power to review. In all collateral proceedings the benefits assessed are conclusively presumed to be received, and the assessment is not open to revisal or review.²

lished: *Shreveport v. Shreveport City R. Co.*, 104 La. 260.

¹ *Norwood v. Baker*, 172 U. S. 269; *English v. Wilmington*, 2 Marvel 63; *Atlanta v. Hamlein*, 96 Ga. 381; *Atlanta v. Hanlein*, 101 Ga. 697; *Preston v. Roberts*, 12 Bush 570; *Louisville v. Selvage* (Ky.), 51 S. W. Rep. 447; *Fidelity Trust, etc. Co. v. Vores's Ex'rs* (Ky.), 61 S. W. Rep. 474; *Thomas v. Gain*, 35 Mich. 155; *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 460; *State v. Elizabeth*, 37 N. J. L. 330. If a legislative act directs such sum to be levied as the cost of a work as shall be shown by the books and vouchers of officers, without further inquiry as to their correctness or as to benefits, the act is void: *People v. Houston*, 54 Cal. 536. An assessment was held void where, in apportioning the benefits to the respective lots from grading a street, an arbitrary rule was adopted, taking into account only the proximity of the lots to the street, without regard to their situation in other respects, or to how they might be affected by the grade: *State v. District Court*, 51 Minn. 539. Where the improvement of a street required a cut varying in depth from almost nothing to nearly thirty feet, an arbitrary assessment on all but three of the lots fronting thereon at ten dollars per foot, without considering or allowing for the damage to any

lot, and leaving one lot without assessment, is unlawful: *Friedrich v. Milwaukee* (Wis.), 90 N. W. Rep. 174. A uniform assessment arbitrarily imposed by the lot on all property affected in the same way by a public improvement will not be sustained if the advantages to the lots vary: *Frevert v. Bayonne*, 63 N. J. L. 202.

² *People v. Hagar*, 52 Cal. 171; *Bigelow v. Chicago*, 90 Ill. 49; *Blake v. People*, 109 Ill. 504; *Sterling v. Galt*, 117 Ill. 11; *Chicago & N. W. R. Co. v. People*, 120 Ill. 104; *Walters v. Lake*, 129 Ill. 23; *Chicago, R. I. & P. R. Co. v. Chicago*, 139 Ill. 573; *Riebling v. People*, 145 Ill. 120; *Newman v. Chicago*, 153 Ill. 469; *Chicago & A. R. Co. v. Joliet*, 153 Ill. 649; *People v. Weber*, 164 Ill. 412; *Billings v. Chicago*, 167 Ill. 337; *Hammond v. People*, 169 Ill. 545; *Illinois Central R. Co. v. People*, 170 Ill. 224; *Galt v. Chicago*, 174 Ill. 605; *Jacksonville v. Hamill*, 178 Ill. 235; *Ricketts v. Spraker*, 77 Ind. 371; *Green v. Shanklin*, 24 Ind. App. 608; *Pearson v. Zable*, 78 Ky. 170; *Baltimore v. Hughes*, 1 Gill & J. 480; *St. Louis v. Rankin*, 96 Mo. 497; *St. Louis v. Excelsior Brewing Co.*, 96 Mo. 677; *Vrana v. St. Louis* (Mo.), 64 S. W. Rep. 180; *State v. Jersey City*, 42 N. J. L. 97; *State v. Newark*, 48 N. J. L. 101, 49 N. J. L. 239; *Coward v. North Plainfield*, 63 N. J. L. 61; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159, 165; *Paul-*

The broad latitude of legislative and administrative discretion in these cases undoubtedly opens the door to many abuses, and it may be a reason for carefully criticising the proceedings, in order to see that the law has been strictly observed; but it

sen v. Portland, 16 Or. 450; Commonwealth v. Woods, 44 Pa. St. 113; Wray v. Pittsburgh, 46 Pa. St. 365, 369; Michener v. Philadelphia, 118 Pa. St. 535. The decision of the board of public works in making a local assessment is final except in case of fraud or mistake, and the improvement may be deemed local although the property in the city or ward is also generally benefited: State v. District Court, 33 Minn. 295. Where commissioners for a local improvement were to pass upon the question whether the contract therefor was free from fraud, it was held that their determination was final: Kendall's Petition, 85 N. Y. 302, citing Matter of Peugnet, 67 N. Y. 441, and questioning Matter of Burmeister, 76 N. Y. 174. An assessment for street betterments cannot be assailed because the adjudication of aldermen in terms was only that the estates "have been benefited." It cannot be presumed that any illegal element entered into the computation: Foley v. Haverhill, 144 Mass. 352. Where a borough charter does not expressly declare, and where the assessment does not show, that the benefits assessed to pay part of the cost of sewerage are special benefits and not general benefits which could not legally be assessed, the assessment will not for that reason be declared void; it will be presumed, unless the contrary is shown, that special benefits only were assessed: Ferguson v. Stamford, 60 Conn. 432. That land on one side of a street is assessed for paving a little more than the land on the other side, because the latter side is encumbered by a street-car track, does not render the assessment invalid, as the assessors

may thus exercise their judgment in apportioning the benefits: Voght v. Buffalo, 133 N. Y. 463. Where part of a lot is condemned for a street, it is presumed that both commissioners and jury, in estimating benefits to the lot, excluded that part of it taken for the street: Waggeman v. North Peoria, 155 Ill. 545. Where an estate receives some degree of benefit from a sewer, and the assessment actually made is by the value of estates, the courts will not interfere: Workman v. Worcester, 118 Mass. 168. The English sewer cases allow great latitude to the commissioners in the assessment of benefits. They are largely collated in Soady v. Wilson, 3 Ad. & El. 248, and it is said by Lord Denman, Ch. J., "from Keighley's Case, 10 Rep. 142*b*, to Rex v. Commissioners of Sewers for the Tower Hamlets, 9 B. & C. 517, the doctrine laid down in them all is uniform and undisputed, as applicable to the present question. It rests on the principle that every one whose property derives benefits from the works of the commissioners may be assessed to the rates they impose. The benefit is not required to be immediate, nor do the cases, or the commission itself, or the statutes, say anything of the nature or amount of the benefit. Possibly that benefit may be so extremely small that a jury would not have found the fact stated in the case. But on the other hand the benefit may be of high value; as if a house were inaccessible because surrounded by marshes, and the work of sewerage had made them hard and passable. . . . If the commissioners had jurisdiction, the court would not inquire whether they had correctly exercised their

can constitute no reason for the judiciary's taking upon itself the correction of legislative mistakes and errors of judgment. When a judicial review is given of the proceedings of assessors, an opportunity may be afforded for laying down the proper controlling principles; but in other cases it must be assumed that the assessors have had the proper rules in view for their own direction. It is clear that any assessment is wrong which charges lands with a sum beyond the special benefits received. If the cost of any improvement exceeds the local and peculiar benefits, the improvement should either not be made at all, or the excess should be assumed by the public, and become a part of the general levy.¹ In making an assessment of actual benefits, it may undoubtedly be proper to take into consideration the fact of the property's being devoted to a permanent use, which for the time being, at least, renders the market value of little or no moment. It has already been stated that this does not preclude the property's being assessed for benefits. As has been justly remarked of some cases of this nature which have been considered by the courts, when lands were devoted to church or cemetery purposes,² "objections to the assessment

judgment, in an action of trespass for levying the rate. But as the jurisdiction results from the fact of benefit being derived, and the case expressly states that some benefit was derived, we think ourselves bound by the finding to say that the defendant had authority to levy the rate, and is consequently entitled to our judgment." It is nevertheless held competent to show, in opposition to the assessment, that no benefit was received. This is on the ground that jurisdiction to make any assessment against a party depends on his premises being benefited, and the commissioners cannot determine the question of jurisdiction in their own favor conclusively: *Masters v. Scroggs*, 3 M. & S. 447; *Stafford v. Hamston*, 2 B. & B. 691. See *Neave v. Weather*, 3 Q. B. 984. But in England, ratability once established, no question of the amount of benefit is permitted to be raised: *Regina v. Head*, 9 Jur. (N.S.) 871. The

question whether property is benefited or not is one of detail, on which the federal Supreme Court will not pass. *Davidson v. New Orleans*, 96 U.S. 97; *Spencer v. Merchant*, 125 U.S. 345; *Lent v. Tillson*, 140 U.S. 316; *Fallbrook Irrig. Dist. v. Bradley*, 164 U.S. 112.

¹ The fair cost of an improvement is not necessarily the measure of benefit to the property benefited thereby. If the cost exceeds the special benefit the public must bear the excess as a general benefit; *Frevert v. Bayonne*, 63 N. J. L. 202. In proceedings to open a street it is not necessary, in order to find that the street is a public necessity, to find that the cost of opening, added to the cost of grading, would not exceed the value of the benefit to the public: *Grand Rapids v. Luce*, 92 Mich. 92.

² *Matter of Mayor, etc.*, 11 Johns. 77; *Matter of Albany St.*, 11 Wend. 150.

proceed on the ground that the owner cannot apply the property to any new or different use. When the owner has the unrestrained power of alienation, and the property may be converted to any new use at his pleasure, it is difficult to see how, upon any principle, an exception can be made to the rule regarding only the market value. After the owner has escaped what would otherwise be a great burden, on the ground that he does not intend to use the property in a way which will make the improvement beneficial, he may change his mind, throw the property into the market, and realize advantages for which others have been made to pay.”¹ And the remark is as applicable to those temporarily appropriated to church or other special purposes as to any others. The fact is only a circumstance to be considered by the assessors in making up their estimate.²

It is no objection to an assessment of benefits that it is made in proportion to value; that may be a proper basis if the com-

¹ *State v. Newark*, 35 N. J. L. 157, 167.

² *People v. Syracuse*, 63 N. Y. 291. The benefits for which an assessment may be made must relate to the betterment of the land for the purposes to which it may reasonably be put: *Blue v. Wentz*, 54 Ohio St. 247. It is proper to refuse an instruction that no benefits for widening a street can be assessed, even if the value has been enhanced, unless at the same time the proposed improvement makes the property more valuable to use: *Friedenwald v. Baltimore*, 74 Md. 116. If the present value of premises is increased by their present use, or if their value would be prejudicially affected by an interference with that use, and such interference would be affected by the proposed improvement, those facts are material to a determination of their present value: *Kankakee Stone, etc. Co. v. Kankakee*, 128 Ill. 173. An instruction that “It makes no difference whether the property assessed is used at present for such

purpose that it will not be especially benefited by the proposed improvement, or is put to any use to which the market value of the same is at present unimportant,” was held not open to the objection that it did not submit to the jury the question of the effect of the proposed improvement upon the property’s present fair cash value: *Thomas v. Chicago*, 152 Ill. 292. Where land of a railroad company is assessed for a sewer, evidence that the effect of the sewer will be to build up the locality, and thus increase the company’s business, is not admissible as proof of benefits to be assessed, since the effect on the company’s business of building up the neighborhood is mere conjecture, and would not necessarily increase the value of the company’s lands: *Rich v. Chicago*, 152 Ill. 18. As to the evidence proper for jury to consider in determining whether a railroad right of way is benefited by drainage, see *Drainage Com’rs v. Illinois Central R. Co.*, 158 Ill. 353.

missioners think it just.¹ Where the assessment is by statute authorized to be upon "the enhanced value of the land," the improvement upon the land must be excluded from consideration.² Where the assessment is to be of the benefits "beyond that general advantage which all property in the city may receive therefrom," an adjudication that the estates have been benefited certain amounts may be presumed to have been made as the ordinance contemplates.³ In assessing benefits the cost of the whole work distributed through the whole district is to be kept in view; the assessors cannot restrict themselves in the case of any particular lot to the cost of the improvement in front of it.⁴ But at the same time they must

¹ *Piper's Appeal*, 32 Cal. 530.

² *People v. Austin*, 47 Cal. 353.

³ *Jones v. Boston*, 104 Mass. 461.

⁴ *Ex parte Mayor of Albany*, 23 Wend. 277; *New Whatcom v. Beltingham Bay Imp. Co.*, 9 Wash. 639. See *State v. Portage*, 12 Wis. 567. Where a large amount of rock has been excavated in the course of a sewer, the extra cost of such excavation cannot be considered as part of the expense to be assessed upon property between the rock and the outlet of the sewer: *Vreeland v. Bayonne*, 58 N. J. L. 126. An assessment for a street improvement may be levied for a different amount on lots abutting on different parts, if the cost is assessed uniformly: *Gilcrest v. McCartney*, 97 Iowa 138. An assessment of the whole expense of a street improvement at the termination of one street in another on two quarter blocks cornering at the termination is erroneous: *Perine v. Lewis*, 128 Cal. 236. The lands of a railroad company, if they are the only property which receives a new frontage by the opening of a street, may properly be assessed with a greater proportion of the expense thereof than is imposed upon the adjoining property: *In re Alexander Av.*, 63 Hun 630, 17 N. Y. Supp. 933. A street assessment is not objection-

able as unequal where a charge for laying and curbing sidewalks is laid against two lots only (to which lots such work was confined by the resolution of intention, while a charge for regrading, etc., is laid against the whole district: *McSherry v. Wood*, 102 Cal. 647. Where, in making a street improvement, squares formed by the intersection of other streets are crossed and improved, the city, if the object in improving the square is to improve the street, may assess the whole expense upon the same property on which the other expenses of the improvements are assessed: *Creighton v. Scott*, 14 Ohio St. 638. See *Motz v. Detroit*, 18 Mich. 495. Where the statute limits the district of assessment for opening a street to the center of the block between the street opened and the next street, it is a fair rule to assess the cost of the land taken for each block of the street upon the property fronting on such block: *In re Rogers Av.*, 29 Abb. N. C. 361, 22 N. Y. Supp. 27. A board in making assessments is not required to graduate them uniformly in exact proportion to distance, as the atmosphere gradually shades off into space, but it must make the assessment uniform in respect to benefits, as nearly as reasonably practicable: *State v. Brill*, 58

carefully keep within the district; this is as imperative as it is in the case of ordinary taxation.¹

Assessment confined to cost. An assessment should be limited to the actual cost of the improvement;² but this may properly include all incidentals, such as the cost of supporting walls to lots which have been cut into; costs of drains to protect the work, cost of advertising, engineering, superintendence, etc.³

Minn. 152. But as a convenient method of equitably adjusting sewer assessments, a municipal board may divide them into "three classes—direct benefit, remote benefit, and more remote benefit:" *Collins v. Holyoke*, 146 Mass. 298. Where a railroad company is required by statute to depress its tracks within a city, and provide suitable bridges at street crossings, the city, in enforcing such requirement, cannot determine that an existing bridge is insufficient and assess the entire cost of a new one on the company's property though other property is also benefited by the bridge: *People v. Adams*, 88 Hun 122.

¹ *Ferris v. Chicago*, 162 Ill. 111; *Turpin v. Eagle Creek, etc. Gravel Road Co.*, 48 Ind. 45; *Matter of Livingston St.*, 18 Wend. 556. A statute provided for viewers to decide upon the expediency of a proposed street extension, and to "ascertain and determine what lots in the vicinity of said extension will probably be benefited by the opening of the said street, and divide and apportion, on equitable principles, the amount that each shall separately contribute to defray the damage incurred," etc. Held, that the term "vicinity" is not a matter of eyesight only, but for the judgment also: *Rogers, J.*, in *Extension of Hancock St.*, 18 Pa. St. 26, 32.

² *People v. McWethy*, 165 Ill. 222, 177 Ill. 334; *Hanscom v. Omaha*, 11 Neb. 37; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Schenely v. Com-*

monwealth, 36 Pa. St. 9. It is a substantial right that the lien of a special assessment for an improvement shall not be greater than necessary: *Chicago Terminal Transfer R. Co. v. Chicago*, 184 Ill. 154. Under the guise of paying the original cost of a pavement the city cannot by assessment collect a fund to be used at some future time for repairs and maintenance: *State v. District Court*, 80 Minn. 339. The fact that certain property owners have paid enough to defray the entire cost of a drainage improvement does not release other owners from paying their assessments: *Hammond v. People*, 169 Ill. 545. Assessments for benefits may properly be made on the basis of the total cost of the improvement, although private persons have agreed to contribute on certain conditions one-third of the cost: *Towne v. Newton City Council*, 169 Mass. 240. A stipulation between a city and a property owner that a special assessment shall be reduced, should the actual cost of the improvement be less than the estimate, does not invalidate assessments against other property for the same improvement: The owner would in such case be entitled to a rebate: *Billings v. Chicago*, 167 Ill. 337.

³ *Swamp-Land Dist. v. Silva*, 98 Cal. 51; *Lincoln v. Street Com'rs*, 176 Mass. 210; *Longworth v. Cincinnati*, 34 Ohio St. 101. Where the fee of land is taken for street purposes, the compensation paid is a part of the cost of a "local improvement" for

But when all proper items of cost are included, if the sum levied appreciably exceeds the amount, there is a plain excess of authority in levying it, and the levy must be treated as illegal.¹ But there is no reason in the nature of things why an

which "assessments" may be levied upon the property to be benefited: *Fairchild v. St. Paul*, 46 Minn. 540. The expense of grading that was necessary in order to pave held properly included in a paving assessment: *Allen v. Davenport*, 107 Iowa 90. See *Scofield v. Council Bluffs*, 68 Iowa 695. The cost of grading and collecting are properly included in an assessment for paving in Maryland: *Dashiel v. Baltimore*, 45 Md. 615; *Baltimore v. Smith*, etc. Brick Co., 30 Md. 458; see *Lowden's Petition*, 89 N. Y. 548; *Matter of Mutual L. Ins. Co.*, 89 N. Y. 530. Under a statute authorizing a city council to widen a street and acquire land therefor, the expense of the work or improvement to be assessed on the district benefited, the assessment cannot include the cost of grading and graveling: *Wilcoxon v. San Luis Obispo*, 101 Cal. 508. Under an Illinois statute, in a proceeding for a special assessment for the construction of a sidewalk the cost of the walk at intersections of streets could be included in the cost of the improvement: *Gage v. Chicago (Ill.)*, 61 N. E. Rep. 849. Interest on sums expended may be included in the cost: *In re Hampshire County*, 143 Mass. 434; *Davis v. Newark*, 54 N. J. L. 144. See *Allen v. Davenport*, 107 Iowa 90. If the lateral support of a lot is removed in grading a street, the cost of a supporting wall cannot be charged upon the lot-owner as a part of the improvement: *Armstrong v. St. Paul*, 30 Minn. 299. The expenses incurred in successfully defending suits brought against a borough because of its negligence in constructing a public improvement cannot be as-

sessed specially as a part of the cost of such improvement: *De Witt v. Rutherford Borough*, 57 N. J. L. 619. Nor can the salary paid by a city to the overseer of a public improvement constructed under contract be assessed against the abutting owners, where neither the charter nor the ordinance authorizing the improvement makes any provision therefor: *Smith v. Portland*, 25 Or. 297. If an item of expenditure on which a municipal assessment is based is for a purpose other than that shown on its face, it is for the party contesting the validity of the assessment to show this: *Ex parte Johnson*, 103 N. Y. 260.

¹ *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468. An assessment for sidewalks on a certain street is rendered void by including therein the expenses of a sidewalk on another street, construction of which was not authorized by ordinance: *Folmsbee v. Amsterdam*, 142 N. Y. 118. The expenses of prior, void proceedings render an assessment invalid if included therein: *Farr v. West Chicago Park Com'rs*, 167 Ill. 355. An assessment which charges part of the property affected by the improvement with items which should be charged wholly against the rest is void *in toto*: *Ryan v. Altschul*, 103 Cal. 174. If an abutting owner is assessed with the cost of a fifteen-inch main sewer where a ten-inch local sewer would have been sufficient, the excess in the cost must be borne by the city: *In re Park Co. Sewer*, 169 Pa. St. 433. Where an excessive assessment for a street improvement has been made, abutting owners are not precluded from

assessment should not be made before the work is actually done, and before the cost shall be finally and conclusively determined. It is usually desirable that the collection of the assessment should proceed as the work progresses, that the contractor or workmen may be paid when it is completed. Indeed the charters of very many cities forbid that any payments shall be made by the corporation, for any street or other local work, except from a fund to be provided by a special assessment made for the purpose; and it is obvious that such works would only be constructed at very serious disadvantage, and at much greater expense, if no payment could be made as the work progressed. It has been said that, in assessing benefits under statutes permitting it, a city common council "is the agent and instrument

objecting to the assessment by the fact that only the fair cost of the work was assessed on private property, and the rest was assessed on abutting public property: *In re Livingston*, 121 N. Y. 94, distinguishing *In re McCready*, 90 N. Y. 652. Where, of the total expense of widening and extending a street, a large amount was illegally incurred, the fact that an amount thereof more than equal to the amount assessed on the property was incurred legally does not render the assessment valid, since the assessment covers the entire benefit derived from the whole improvement: *Warren v. Boston* (Mass.), 62 N. E. Rep. 951. The requirement from the contractor for a local improvement that he shall give a guaranty to maintain and repair the same does not vitiate an assessment as increasing the cost: *Graham v. Chicago*, 187 Ill. 264, citing *Cole v. Chicago*, 161 Ill. 16. The right to enforce the collection of an assessment for a street improvement is not impaired by the fact that the contract for the work contained a provision for disposing of surplus earth: *Sims v. Hines*, 121 Ind. 534. That the assessment for a particular water-main exceeds the cost of put-

ting down such main is no objection to the validity of the assessment; the main being part of an entire system, and the assessment being prescribed not merely to put down the pipes, but to raise a fund to keep them in repair: *Parsons v. District of Columbia*, 170 U. S. 45. Where a city charges interest greater than the legal rate on an assessment for street improvements, and makes a charge for a certificate of sale of property on which the assessment had not been paid, the property owner having made no offer to pay the assessments, such charges will not invalidate the assessment: *Wright Seminary v. Tacoma*, 23 Wash. 109. In California a street assessment which includes the cost of more work than that authorized is not void as to the cost of work properly included therein, and may be corrected on appeal to the board of supervisors: *Dyer v. Scalmanini*, 69 Cal. 637. Items of cost improperly included may be deducted in proceedings to set the assessment aside, and the rest sustained: *Matter of Metropolitan Gas Light Co.*, 85 N. Y. 526; *In re Merriam*, 84 N. Y. 596. See *Cincinnati v. Anchor White Lead Co.*, 44 Ohio St. 243.

of the land owners in respect to these improvements. The work is to be conducted and completed under its direction. It is to ascertain how much certain owners are to pay and others receive; to collect the money and see that it is applied to the purposes of the improvement. Its authority must be strictly pursued."¹ But it must also, in order to be enabled to perform its agency to advantage, be allowed to make the assessment, and even the collection if it shall be deemed proper, in advance. It has been repeatedly held that this is admissible.² The assessment must of course be made upon an estimate which may be more or less incorrect, as all estimates for public works are likely to be, but the liability to error ought not to defeat a special any more than a general levy for future purposes. If it prove too large it is not fatal,³ though the excess properly belongs to the lot-owners, who would be entitled to have it returned to them.⁴ Should the improvement be abandoned the lot-owners would also be entitled to have their payments returned;⁵ and in a case where a contemplated street opening

¹ Brown, J., in *Howell v. Buffalo*, 15 N. Y. 512, citing *McCullough v. Brooklyn*, 23 Wend. 458; *Lake v. Williamsburgh*, 4 Denio 520; *Sharp v. Speir*, 4 Hill 76.

² *Henderson v. Baltimore*, 8 Md. 352; *Kingman, Petitioner*, 153 Mass. 566; *Manice v. New York*, 8 N. Y. 120; *Scoville v. Cleveland*, 1 Ohio St. 129; *Felker v. New Whatcom*, 16 Wash. 178. There cannot, under the Iowa code, be a paving assessment on abutters, where the only work done is grading, merely preparatory to paving: *Bucroft v. Council Bluffs*, 63 Iowa 646. The provisions of an act for a lien on land for benefits assessed against it are not rendered invalid by the mere fact that as the improvement may never be completed, the benefits may never accrue: *Davies v. Los Angeles*, 86 Cal. 37.

³ *Davies v. Los Angeles*, 86 Cal. 37; *Danforth v. Hinsdale*, 177 Ill. 579; *Scovill v. Cleveland*, 1 Ohio St. 126. The levy of a special assessment in excess of the estimate, duly made

and approved, of the amount necessary to pay for the improvement, is invalid: *Byrne v. South Springfield*, 161 Ill. 285. But see *Hill v. Swingley*, 59 Mo. 45.

⁴ It is held in *Thayer v. Grand Rapids*, 82 Mich. 298, that *assumpsit* lies against the city to recover such excess. In *Mayer v. New York*, 101 N. Y. 284, a property owner was allowed to maintain a suit in equity against the city to have the benefit of a proportional part of an amount which the latter had saved by getting the expenses reduced. It was held in *Thompson v. Hill*, 184 Ill. 17, that on an application for judgment upon an assessment for a local improvement, evidence as to the reduction by agreement of the assessment against another property owner is not admissible: if an assessment against other property is too large it may properly be reduced by agreement.

⁵ *Valentine v. St. Paul*, 34 Minn. 446. See *Strickland v. Stillwater*, 63 Minn. 43.

had been in part defeated at the instance of one land-owner, an assessment for benefits made against another owner upon the basis that the opening would be carried out fully, was set aside.¹

The assessment itself. As in the case of ordinary taxes, assessments are made either against the land as such, or against the separate interests which individuals have in the land, according as the statute shall prescribe. In either case there should be a sufficient description of the land for the purpose of identification,² and in the latter case it is imperative that

¹ Butler v. Keyport, 64 N. J. L. 181.

² Upton v. People, 176 Ill. 632; Sharp v. Johnson, 4 Hill 92. Where it is not possible to tell what land was assessed, or against what land the judgment of confirmation was entered, the assessment and judgment will be void: People v. Chicago & A. R. Co., 96 Ill. 369; People v. Dragstran, 100 Ill. 286; Sanford v. People, 103 Ill. 374; Pickering v. Lomax, 120 Ill. 289; People v. Eggers, 164 Ill. 515. A description of property for assessment for a public improvement must be of the lot of land as it is legally known and designated. An arbitrary subdivision into lots or strips where the owner has not seen fit to subdivide his land is illegal: Warren v. Chicago, 118 Ill. 329; Cram v. Chicago, 139 Ill. 265; People v. Cook, 180 Ill. 341. It is a sufficient objection to judgment for a special tax that there is no such lot as that described in the proceedings wherein judgment is sought: Vennum v. People, 188 Ill. 158. A description of property in an assessment for street improvements as "tract of land north side between Front St. and O. M. R. R." is not sufficiently definite: Becker v. Baltimore & O. S. W. R. Co., 16 Ind. App. 324. Where land is described in a special assessment roll as the south twenty acres in the subdivision of a

certain section, the fact that such tract is intersected by streets, rendering the net area less than twenty acres, does not invalidate the assessment, where it does not appear but that the commissioners deducted the area of the streets in estimating the benefits received by such tract: De Koven v. Lake View, 129 Ill. 399. In assessing for drainage purposes in Illinois, it is not necessary that lands should be assessed in the smallest legal subdivisions, but disconnected lots should not be united: Moore v. People, 106 Ill. 376. Under a statute providing that a special assessment roll shall contain a description of each lot, block, tract, or parcel of land benefited, and the names of the owners, so far as known, a single lot, divided by a street, need not be assessed in two parcels, when each parcel of the lot belongs to the same owners: De Koven v. Lake View, 129 Ill. 399. Under provisions that assessments for benefits shall be levied on "each separate lot or parcel of land," and on "the several lots or parcels of land," an assessment on the component parts of a tract which the owner has always treated as an entirety, and dividing it by lines which intersect valuable buildings, is illegal: Muller v. Bayonne, 55 N. J. L. 102. Where the owner, by the manner of his use and im-

the separate interests be taken notice of in the assessment.¹ If the assessment is to be made by a board of several persons,

provement of the land, has discarded artificial divisions on plats of survey, and has practically made one lot of several, he cannot complain if his property is treated as one piece in assessing for a municipal improvement: *Wolfort v. St. Louis*, 115 Mo. 139. And where assessments are leviable on "adjoining property . . . calculating a depth to each property of 150 feet," a tract of land bordering on the improved street and running back from it to a depth of sixty feet is subject to taxation when used as an entirety, though, according to the plat, it is formed of two lots: *Ibid.* Under the charter of St. Louis benefits for street improvements cannot be assessed in gross on several contiguous lots: *St. Louis v. Provenchere*, 92 Mo. 66. Under the Rhode Island statutes the fact that separate lots are, for convenience, separately assessed for a sewer, although the whole of the estate is assessable, does not invalidate the assessment, the amounts being added up into a single total: *Bishop v.*

Tripp, 15 R. I. 466. Where by contract to convey part of a lot each part is made a separate parcel, the board of public works, having notice thereof before confirmation of the assessment, should assess the damages and benefits to it as a separate lot or parcel, and not having done so the board's proceedings as to that tract are void: *Brennan v. St. Paul*, 44 Minn. 464. In Ohio, abutting property not laid out into lots may, in an assessment for a street improvement, be treated as undivided parcel: *Schroder v. Overman*, 61 Ohio St. 1. When a street is cut through a city lot, two lots remain for the purposes of assessment: *Spangler v. Cleveland*, 35 Ohio St. 469; *Younglove v. Hackman*, 43 Ohio St. 69. For descriptions which consisted of diagrams of the property, which were held insufficient in an assessment, see *Himmelman v. Cahn*, 49 Cal. 282; *Himmelman v. Bateman*, 50 Cal. 11; *San Francisco v. Quackenbush*, 53 Cal. 52; *Blanchard v. Ladd* (Cal.), 67 Pac. Rep. 131.

¹ *Matter of De Graw St.*, 18 Wend. 568. Where there are separate and distinct interests in the same land owned by different persons, assessments for the improvement of a street on which the land abuts should be made separately against each owner; but a joint assessment is a mere irregularity which may be waived by the persons against whom it is made: *New London v. Miller*, 60 Conn. 112. And an assessment cannot be made against one only of several joint owners for the benefits accruing to the whole property, but must be either separately against each owner or jointly against all: *Ibid.* An assessment to "owners and occupants" for bene-

fits received is not the same thing as an assessment upon the lands: *Sharp v. Speir*, 4 Hill 76. In Illinois special assessments are not illegal because not made in the names of the owners: *Zeigler v. People*, 164 Ill. 531. It is held in Iowa that where the property is properly described, error in the owner's name is immaterial: *Smith v. Des Moines*, 106 Iowa 590. Under a charter provision that a sewerage assessment upon a non-resident owner's unoccupied lot shall be made in his name and entered in a list of non-resident owners, etc., an assessment against a person who does not hold the legal title is void: *Hill v. Warrell*, 87 Mich. 135.

they must act as a board jointly.¹ An assessment will be void if not made according to a standard which is fixed by law.² If it exceeds the value of the lot assessed, it is an unconstitutional appropriation of property;³ but it will not necessarily be void because it exceeds the valuation for annual taxation, there being no showing how near it comes to actual value, or that it exceeds the benefits.⁴ As has already been shown, stat-

See, also, *Norton v. Courtney*, 53 Cal. 691; *Whiting v. Quackenbush*, 54 Cal. 306; *Williams v. McDonald*, 58 Cal. 527; *Brady v. Page*, 59 Cal. 52. As to description of railway property for a special assessment, see *Cicero & P. St. R. Co. v. Chicago*, 176 Ill. 501; *West Chicago St. R. Co. v. Chicago*, 178 Ill. 339; *Lake St. El. R. Co. v. Chicago*, 183 Ill. 75; *South Chicago City R. Co. v. Chicago*, 196 Ill. 490; *Cleveland, C., C. & St. L. R. Co. v. O'Brien*, 24 Ind. App. 547. Where the descriptions of the tracts of land involved in the proceedings are copied, as the statute requires, from the tax duplicate, the description will, *prima facie* at least, sustain an assessment for benefits: *Sample v. Carroll*, 132 Ind. 496. The fact that property subject to a special assessment is assessed by the description of a different property is not ground for objection on the part of the owner of the latter that his property is twice assessed, when the owner of the first property has paid the assessment: *Gregory v. Ann Arbor*, 127 Mich. 454. That an ordinance and assessment roll differ in their descriptions of the termini of an improvement is immaterial, where the points are the same in fact: *Spokane v. Browne*, 8 Wash. 317. The validity of a sewer assessment does not necessarily depend on the accuracy of the description of a lot assessed, it not appearing that injustice has resulted therefrom: *Morse v. Buffalo*, 35 Hun 613. One who has stood silent without object-

ing to the building of sidewalks in front of his land on streets dedicated by him to the public cannot afterwards object to an insufficiency in the description of his land as a reason why an assessment against it should not be enforced: *Ritchie v. South Topeka*, 38 Kan. 368. Nor can a lot-owner object to the confirmation of an assessment because the description of the lot assessed is not sufficient to include the entire lot, the error inuring to his benefit: *Illinois Central R. Co. v. Decatur*, 126 Ill. 92.

¹ *People v. Hagar*, 49 Cal. 229. See, as to the meaning of a requirement that the commissioners shall "jointly view and assess upon each and every acre," etc., *People v. Hagar*, 52 Cal. 171. Delay on the part of county commissioners in performing certain public improvements which they are authorized by statute to make, does not constitute laches so as to prevent the assessment on any persons benefited. The commissioners are simply a board of public officers intrusted by the legislature with the performance of the work, and they do not act as agents for the county so as to charge with their laches: *In re Hampshire County*, 143 Mass. 424.

² *State v. District Court*, 29 Minn. 62.

³ *Zoeller v. Kellogg*, 4 Mo. App. 163.

⁴ *Matter of Sackett, etc. Streets*, 74 N. Y. 95. As to how value is to be arrived at, see *Matter of St. Joseph's Asylum*, 69 N. Y. 353.

utory provisions limiting the amount or rate of taxation are construed as not applicable to special assessments for improvements;¹ but where there is an express limitation it must be observed or the assessment will be void, at least as to the excess.² And when the assessment in any one case is limited to half the assessed value of the lands, the authorities cannot evade the limitation by laying two assessments for what in fact is but one improvement.³

It has been held that an assessment will date from the order for the improvement,⁴ and that where a city has adopted an improvement ordinance it should be governed by the law in force at the time of the passage of such ordinance with respect to the manner of assessment and the rights and liabilities of the owners of abutting property.⁵

¹ *Ante*, p. 175.

² See *Elkhart v. Wickwire*, 121 Ind. 331; *Cincinnati v. Conner*, 55 Ohio St. 82; *Hays v. Cincinnati*, 62 Ohio St. 116. Where the statute limited the amount to be levied by special assessment upon any lot for any one improvement to twenty-five per cent. of the assessed value, and the amount to be raised in any one year to five per cent., an assessment was held valid where the total amount levied for a paving assessment was not more than twenty-five per cent. of the taxable value, and each annual instalment was less than five per cent. Under a statute limiting assessments to twenty-five per cent. of "the value of the property as assessed for taxation," in fixing the valuation of land for assessment by the front foot or otherwise, the value of the improvements thereon must be considered, rather than the land alone: *Findlay v. Frey*, 51 Ohio St. 390.

³ *Matter of Walter*, 75 N. Y. 354.

⁴ *Jones v. Boston*, 104 Mass. 461, citing earlier Massachusetts cases. It was held in *Brophy v. Harding*, 137 Ill. 621, that an assessment dated from the date of the commissioners'

report, not from the date of the confirmatory judgment. The liability of lands for local improvements springs from the construction of an authorized public work which confers a special benefit upon lands. It arises when the work is performed, and the assessment proceeding is merely the determination of the amount which, within the limit of such imparted value, shall be returned to the public. A change in the ownership of lands benefited by the improvement produces no effect upon the ability of the corporate authorities to make the assessment. The assessment, when made, and re-assessment, if prior assessments are set aside, relate back to the time the improvement was begun. A purchaser taking title after that event takes subject to the power of the municipal body to make, and of the legislature to authorize, assessments and re-assessments; and the subsequent purchaser's title will be subject to these burdens whenever they may be imposed. In re Report of Com'rs of Adjustment, 49 N. J. L. 488.

⁵ *Cincinnati v. Seasingood*, 46 Ohio St. 296. As to the property owner's

Review of assessment. In some cases statutes provide for an appeal from the assessment to some superior administrative authority or to a court.¹ In other cases confirmation of the assessment is provided for and must take place before it has legal force.² Whatever notice is required of the assessment, or

vested right to be assessed according to the method in force when the work was ordered, see *Spokane v. Browne*, 8 Wash. 317.

¹ The action of a city council in providing for an alleged local improvement, to be paid for by special taxation, is reviewable by the courts: *Bloomington v. Chicago & A. R. Co.*, 134 Ill. 451. A street assessment which appears on its face to have been made in violation of statute can be objected to without a previous appeal to the board of supervisors: *Ryan v. Altschul*, 103 Cal. 174; *Kenny v. Kelly*, 113 Cal. 364; *Perine v. Lewis*, 128 Cal. 236. Where the contract for an improvement has become inoperative because of an unwarranted change therein for the letting, the assessment cannot become valid by a failure of the property owners to appeal to the board of supervisors for the collection thereof: *Warren v. Chandos*, 115 Cal. 382. A general notice of appeal from a street paving assessment need not mention the names of persons affected — it is directed to all persons in the world who may be affected thereby, and all persons will be bound by it when so given: *Williams v. Viselich*, 121 Cal. 314. A petition for a jury to revise an assessment does not vacate the original assessment: *Clark v. Worcester*, 167 Mass. 81.

² That objections to assessment or to the confirmation thereof must be taken within the time and in the manner provided by law, see *Le Moyne v. West Chicago Park Com'rs*, 116 Ill. 41; *Tuttle v. Polk*, 92 Iowa 433; *McKusick v. Stillwater*, 44 Minn. 372; *State v. Norton*, 63 Minn. 497; *Hayday v. Ocean City (N. J.)*, 50 Atl.

Rep. 584; *New Whatcom v. Bellingham Bay Imp. Co.*, 16 Wash. 131; *Northwestern, etc. Bank v. Spokane*, 18 Wash. 456; *Wright Seminary v. Tacoma*, 23 Wash. 109. As to the order for filing petition for confirmation, see *Haley v. Alton*, 152 Ill. 113. Recitals in such petition: *Ibid.*; *Hull v. Chicago*, 156 Ill. 381. Mortgagees held to be "persons interested" who may appear and contest confirmation: *Morey v. Duluth*, 75 Minn. 221. Question of legality of proceedings under which park commissioners obtained control of a street cannot be raised on application for confirmation: *West Chicago Park Com'rs v. Sweet*, 167 Ill. 326. Effect of delay in confirming assessment: *In re Deering*, 14 Daly 89. Action of city council in confirming roll: *Brown v. Saginaw*, 107 Mich. 643. Conclusiveness of such action: *People v. Wilson*, 115 N. Y. 515. Power of court in confirming assessment: *Michael v. Mattoon*, 172 Ill. 288; *Phelps v. Mattoon*, 177 Ill. 169; *State v. Ensign*, 55 Minn. 278. Separate judgments upon separate objections: *Browning v. Chicago*, 155 Ill. 314; *Zeigler v. People*, 156 Ill. 133; *Wisner v. People*, 156 Ill. 180; *Bliss v. Chicago*, 156 Ill. 584; *Beach v. People*, 157 Ill. 659; *Delamater v. Chicago*, 158 Ill. 575. Judgment of confirmation several as to each tract of land assessed: *Jones v. Lake View*, 151 Ill. 663; *Doremus v. People*, 173 Ill. 63. Order of confirmation not revocable: *Philadelphia, W. & B. R. Co. v. Shipley*, 72 Md. 88. Judgment as a bar: *Rich v. Chicago*, 187 Ill. 396. Conclusiveness of judgment: *Riebling v. People*, 145 Ill. 120; *Chicago W. D. R. Co. v. People*, 154 Ill. 256.

of other proceedings which are to render it effectual, must be given with the same strictness as in the earlier proceedings.¹ What questions shall be open on the appeal, and in what manner they shall be disposed of, must be determined on an in-

¹ *Lyon v. Alley*, 130 U. S. 177; *McDonald v. Littlefield*, 5 Mackey 574; *McChesney v. People*, 145 Ill. 614; *Larson v. People*, 170 Ill. 93; *Maxwell v. Chicago*, 185 Ill. 18. Where an ordinance required notice of an assessment from which notice interest was to be charged, failure to give it was not material on *certiorari* to quash the tax, as it affected only the charge of interest: *Walker v. District of Columbia*, 6 Mackey 352. Notice of an assessment for a sewer was held not insufficient because not given until after the assessment was levied: *Smith v. Abington Sav. Bank*, 171 Mass. 178. A notice of assessment for a street opening is not invalid because given longer than the law requires: *In re Lexington Av.*, 63 Hun 629. A requirement of six days' notice held to be six days exclusive of Sunday: *Sewall v. St. Paul*, 20 Minn. 511. The ten days' notice to be given of an application for the confirmation of an assessment is sufficient when given by a single publication ten days before; publication for ten successive days prior to the application is unnecessary: *Aldis v. South Park Com'rs*, 171 Ill. 424; *Royal Ins. Co. v. South Park Com'rs*, 175 Ill. 491. Publication "at least five successive days:" *Evans v. People*, 139 Ill. 552; *Perry v. People*, 155 Ill. 307; *Chandler v. People*, 161 Ill. 41; *Toberg v. Chicago*, 164 Ill. 572; *Casey v. People*, 165 Ill. 49. Where notice of a special assessment is to be "served on every person," leaving a copy at his residence with a member of his family is insufficient: *Wilson v. Trenton*, 53 N. J. L. 645. Where the statute makes no specific requirements

of how notices of an assessment shall be served on a resident land-owner, a communication sent through the mail and actually received is substantial notice: *Lawrence v. Webster*, 167 Mass. 513. But where the statute requires notice to non-residents to be published in a newspaper, mailing a copy to the address is insufficient: *Wilson v. Trenton*, 53 N. J. L. 645. Personal service held sufficient where publication as provided by statute was impossible: *Tumwater v. Pix*, 15 Wash. 324. Where an owner of lands had previously been informed of the city council's intention to order the land to be filled, and to assess the whole or part of the expense to him, a bill sent by the city treasurer showing the owner was debtor to the city in a certain amount for the filling of the land is a sufficient notice of the assessment: *Lawrence v. Wheeler*, 167 Mass. 513. The fact that a paper in which notice of an assessment for street improvements was published, as required by law, was issued earlier in the same day on which the resolution ordering the assessments was approved by the mayor, does not render such notice void, as fractions of a day are not regarded: *Pooley v. Buffalo*, 122 N. Y. 592. That the published notice of an assessment does not affirmatively state that the street improved is in the city which ordered the improvement made, is not fatal; since the presumption is that the city council did not intend to transcend its territorial jurisdiction: *Wheeler v. People*, 153 Ill. 480; *Stanton v. Chicago*, 154 Ill. 23. A notice of an assessment for benefits was held to comply with the

spection of the statute.¹ It is provided in Illinois that on an application for judgment on a delinquent special assessment no defense shall be made which might have been interposed in the proceeding for the making of such assessment, or the application for the confirmation thereof.² Purely technical

city charter where it described lands by given distances along specified streets and avenues, and substantially shows that such lands are assessed for benefits: *State v. Bayonne*, 52 N. J. L. 503. The fact that notice of assessment for local improvements was sent to the "Chicago W. Div. R. R. Co.," the owner being the "Chicago West Division Railway Company," does not invalidate the notice, as the former name is clearly a mere abbreviation of the latter, and a notice so addressed might well be received by the proper corporation: *West Chicago St. R. Co. v. People*, 156 Ill. 18. Immaterial departure from statute in giving notice, held not fatal: *Lowden's Petition*, 89 N. Y. 548. As to affidavit of notice, see *Evans v. People*, 139 Ill. 552; *Schemick v. Chicago*, 151 Ill. 336; *West Chicago St. R. Co. v. People*, 156 Ill. 18; *Michael v. Mattoon*, 172 Ill. 394; *Moll v. Chicago*, 194 Ill. 28. And as to waiver of notice, see *Walters v. Lake*, 129 Ill. 23; *Quick v. Lake Forest*, 130 Ill. 323; *Rich v. Chicago*, 152 Ill. 18; *Haley v. Alton*, 152 Ill. 113; *Yarnill v. Brown*, 170 Ill. 362; *State v. District Court*, 40 Minn. 5.

¹See *People v. Chapman*, 127 Ill. 387; *Walker v. Aurora*, 140 Ill. 402; *Ross v. Stackhouse*, 114 Ind. 200; *Campbell v. Board of Com'rs*, 118 Ind. 119; *Board of Com'rs v. Paulen*, 118 Ind. 158; *Kirkpatrick v. Taylor*, 118 Ind. 329; *Sims v. Hines*, 121 Ind. 534; *Boyd v. Murphy*, 127 Ind. 174; *Chambliss v. Johnson*, 77 Iowa 611; *Berry v. Des Moines (Iowa)*, 87 N. W. Rep. 747; *Alden v. Springfield*, 121 Mass. 27; *In re Hampshire County*, 143 Mass. 424; *Auditor General v. Maier*,

95 Mich. 127; *Eno v. New York*, 68 N. Y. 214; *Teegarden v. Racine*, 56 Wis. 545. Where six separate lots on the same street are assessed for the same improvement, the owner by appealing from the assessment as to four of the lots cannot suspend proceedings to collect the assessment against the other two: *Pittsburgh v. Maxwell*, 179 Pa. St. 553. An appeal from an assessment for a street improvement by one property owner for objections to the entire improvement prevents recovery of assessments against other owners while such appeal remains undetermined: *Girvin v. Simon*, 127 Cal. 491. By appealing from the award of damages the land-owner waives all question as to the regularity of the assessment, and where, on such appeal, he receives an increase of damages, he is estopped to allege that the damages were not legally awarded: *State v. Harland*, 74 Wis. 11.

²See *Chicago & Northwestern R. Co. v. People*, 120 Ill. 104; *Murphy v. People*, 120 Ill. 234; *Clark v. People*, 146 Ill. 348; *Chicago W. D. R. Co. v. People*, 154 Ill. 256; *Meadowcroft v. People*, 154 Ill. 416; *West Chicago St. R. Co. v. People*, 155 Ill. 299; *People v. Ryan*, 156 Ill. 620; *Fisher v. People*, 157 Ill. 85; *People v. Green*, 158 Ill. 594; *Hertig v. People*, 159 Ill. 237; *Kirchman v. People*, 159 Ill. 265; *Boynton v. People*, 159 Ill. 523; *Keeler v. People*, 160 Ill. 179; *Dickey v. People*, 160 Ill. 633; *Kimball v. People*, 160 Ill. 653; *Doremus v. People*, 161 Ill. 26; *Culver v. People*, 161 Ill. 89; *Harris v. People*, 162 Ill. 288; *Steenberg v. People*, 164 Ill. 478; *Casey v. People*, 165 Ill. 49; *People v. Lingle*,

objections to the proceedings will be disregarded everywhere;¹ and if the appellate tribunal is given authority to correct substantial errors, it may do so whenever practicable consistently with a just protection to the rights of parties.²

165 Ill. 65; *People v. Colvin*, 165 Ill. 67; *Hull v. People*, 170 Ill. 246; *Walker v. People*, 170 Ill. 410; *Church v. People*, 174 Ill. 366; *McManus v. Raymond*, 183 Ill. 391; *Pipher v. People*, 183 Ill. 436; *Leitch v. People*, 183 Ill. 569; *Thompson v. People*, 184 Ill. 17; *Perisho v. People*, 185 Ill. 334; *Rich v. Chicago*, 187 Ill. 396; *Gross v. People*, 193 Ill. 260; *People v. Talmadge*, 194 Ill. 67; *Vandersyde v. People*, 195 Ill. 200. The objection that land assessed by lots had been laid out into lots may be made after confirmation on application for judgment: *People v. Eggers*, 164 Ill. 515.

¹*San Francisco v. Certain Real Estate*, 50 Cal. 188; *Whiting v. Quackenbush*, 54 Cal. 306; *Dyer v. Parrott*, 60 Cal. 551; *Keese v. Denver*, 10 Colo. 112; *Ferguson v. Stamford Borough*, 60 Conn. 432; *Lowerre v. New York*, 46 Hun 253; *State v. Jersey City*, 52 N. J. L. 490; *Wewell v. Cincinnati*, 45 Ohio St. 407; *Clinton v. Portland*, 26 Or. 410. An over-estimate of the area of an estate will not be regarded if the estate is not over-assessed: *Keith v. Boston*, 120 Mass. 108. The fact that the cost of a street improvement has not been apportioned in accordance with the statute constitutes no defense to an assessment unless the property owner shows that the amount assessed against his property is greater than it would have been had the apportionment been made as required: *Levi v. Coyne* (Ky.), 57 S. W. Rep. 790. Objections to proceedings for condemning a street cannot defeat a subsequent paving assessment: *Dashiell v. Baltimore*, 45 Md. 615. In a suit for a paving assessment in Maryland it is immaterial that it is made in a former

owner's name: *Ibid.* That the last instalment of an assessment is made much larger than any of the other four does not, though irregular, prejudice the property owner or affect the validity of the last instalment: *Glover v. People*, 194 Ill. 22. Under a statute giving the commissioners power after final order to make any change or addition necessary, the failure to place benefited lands upon the assessment roll for a road tax is a mere irregularity which will not avoid the tax, and may at any time be corrected by the commissioners. And the misconduct of the commissioners in selling lower than the statute authorizes, the bonds which the tax is to pay, will not affect its legality: *Ricketts v. Spraker*, 77 Ind. 371; *Stoddard v. Johnson*, 75 Ind. 20. A contractor who has constructed a sewer may recover an assessment of a lot-owner though the lot had been assessed in another's name: *Allen v. Woods* (Ky.), 45 S. W. Rep. 106.

²A jury on an appeal by one lot-owner from an assessment will not consider the relative benefits to other estates if they find the appellant's estate to be benefited and correctly assessed: *Keith v. Boston*, 120 Mass. 108; *Snow v. Fitchburg*, 136 Mass. 183. "The proper inquiry is what proportion the assessment on appellant's land had to the assessment imposed on all the other lands and lots, and not how it compared with the assessment on any specified lot or lots." *Clark v. Chicago*, 166 Ill. 84, citing *Fagan v. Chicago*, 84 Ill. 227; *Bigelow v. Chicago*, 90 Ill. 49. Where a lot-owner has paid for improving part of an alley fronting his land, he

Payment of assessments. Much of what was said in a previous chapter in regard to the payment of general taxes applies here.¹ As has been remarked in a recent case, "the time and manner of the payment of assessments after they have been made in conformity to law is a matter within the legislative discretion, and its action in that respect ought not to be disturbed unless it is manifestly unjust and oppressive."² Accordingly, statutory provisions for the payment of assessments in instalments have been sustained,³ although ordinances contain-

may be relieved, under an authority for correcting an assessment, from the cost of improving the remainder: *Beck v. Obst*, 12 Bush 268. See *Chicago v. Sherwood*, 104 Ill. 549. Court held to have power to recast an assessment so as to include benefited but omitted property, thus enforcing the rule of equality: *Jones v. Lake View*, 151 Ill. 663; *Johnson v. Kochersperger*, 177 Ill. 64. Also to deduct from the assessment that part of the expense of paving which a street railway company by a subsequent franchise had been required to pave: *Thompson v. Highland Park*, 187 Ill. 265. A local board empowered to set aside a sewer assessment, where substantial injustice has been done, may refuse to set it aside although an item was wrongfully included, if the difference in the amount payable by the petitioner would be very slight: *People v. Kelly*, 33 Hun 389. The whole assessment will not be quashed for an illegal part which can be separated, but that part only: *Walker v. District of Columbia*, 6 Mackey 352.

¹ Ch. XIV.

² *Ladd v. Gambell*, 35 Or. 393.

³ *Ladd v. Gambell*, 35 Or. 393. The provision was that owners whose assessments exceeded twenty-five dollars might pay them in instalments, the city to issue interest-bearing bonds for the amount of deferred instalments to pay for the improvement. In *Lightner v. Peoria*, 150 Ill.

80, and *English v. Danville*, 150 Ill. 92, it was held that a special tax to pay for a local improvement might be divided into annual instalments. It was held in *Gross v. Grossdale*, 177 Ill. 248, that where the corporate authorities have divided an assessment into instalments as required by the statute, they need not make a new division owing to the fact that some of the property may be relieved from the assessment by trial or otherwise. Under a statute authorizing the municipality to prescribe the mode in which the charge on lot-owners shall be assessed for improvements and made effective, it can prescribe a certificate of assessment payable in instalments conditioned on the waiver of irregularity or illegality in the assessment: *Talcott v. Noel*, 107 Iowa 470. Where the last instalment was much larger than any of the other four, the irregularity was held not prejudicial to the property owner: *Glover v. People*, 194 Ill. 22. Where an assessment is made payable in instalments, interest on all instalments may be allowed in the confirmation of the assessment: *People v. Weber*, 164 Ill. 412. Under a statute providing that a drainage commissioner may require assessments made in aid of the drain's construction to be paid in instalments not exceeding twenty per cent. per month at such time as he may fix, after twenty days' notice, it is no objection to the assessment that

ing such provisions have been held void when not authorized by legislative act.¹

Evasion of assessment. A sale of land in good faith for value is not rendered void by the fact that one of the reasons for it was so to divide the grantor's land as to reduce the paving assessment thereon; but a conveyance of a strip two feet wide along one side of a city block, made after the letting of a contract for paving the street on which the strip abuts, and solely to avoid the paving assessment on the rest of the block, to a grantee knowing the facts and paid to accept the conveyance, is void for the purpose of assessment.²

Collection of assessments. Collection may be provided for in any of the methods admissible in other cases, and what has been said on the subject of collection of general taxes is therefore applicable to the collection of special assessments whenever the proceedings are analogous.³ It has become customary, however, to provide by law that in the case of city improvements the contractor shall look solely to an assessment upon the lots benefited for his compensation; the collection under some laws to be made by the municipality, and under others by the

a full month does not elapse between most of the times fixed for the payment of instalments: *Hackett v. State*, 113 Ind. 532. As to the division of an assessment into instalments for payment, see, also, *Andrews v. People*, 164 Ill. 581; *Latham v. Wilmette*, 168 Ill. 153; *Charleston v. Johnston*, 170 Ill. 336; *Walker v. People*, 170 Ill. 410; *Parker v. La Grange*, 171 Ill. 344; *Michael v. Mattoon*, 172 Ill. 394; *Danforth v. Hinsdale*, 177 Ill. 579; *Mason v. Chicago*, 178 Ill. 499; *Gage v. Chicago*, 195 Ill. 490; *Mall v. Portland*, 35 Or. 89. An assessment is not rendered void by a failure to divide it into instalments, or to divide it properly, as required by law. Division may be compelled by *mandamus*: *Delamater v. Chicago*, 158 Ill. 582; *People v. Markley*, 166 Ill. 48; *Shannon v. Hinsdale*, 180 Ill. 202. As to credit of apparent

surplus upon instalments still unpaid, see *People v. Chicago*, 152 Ill. 546. Where the descriptions of lands for special assessments are void, payment of certain of the instalments must be regarded as voluntary contributions, and it does not estop the owner from objecting to further payment: *Upton v. People*, 176 Ill. 632; *Wakeley v. Omaha*, 58 Neb. 245.

¹ *Culver v. People*, 161 Ill. 89; *Farrell v. West Chicago*, 162 Ill. 280; *Connor v. West Chicago*, 162 Ill. 287; *White v. West Chicago*, 164 Ill. 196.

² *Eagle Manuf. Co. v. Davenport*, 101 Iowa 493; *Stifel v. Brown*, 24 Mo. App. 102.

³ See *ante*, ch. XIV. If the collection of special assessments is enforced by imposing penalties, only such as are strictly within the range of the statute are admissible: *Ankeny v. Hennigsen*, 54 Iowa 29.

contractor himself. Such laws raise special questions, and decisions upon some of them are referred to in the margin.¹ They

¹ *California*. Where a contractor for street improvements is to be paid by assessment of benefits, he agreeing to exempt the city from any liability under his contract, he cannot recover from the city for the improvements, because no legal assessments can be made to pay him therefor: *Lucas v. San Francisco*, 7 Cal. 463, 474; *Connolly v. San Francisco* (Cal.), 33 Pac. Rep. 1109. A statute providing that in case the assessment for the payment of a contract is adjudged invalid through no fault of the contractor, the board of supervisors shall pay the amount due the contractor out of the city's street department fund, presupposes a valid contract binding on the city and county; and where it has been adjudged by the court that there was no assessment because there was no contract, no liability attaches to the municipality: *Daly v. San Francisco*, 72 Cal. 154. Under a provision that after a contractor has fulfilled his contract, the street superintendent shall make an assessment to cover the amount due on work performed, an assessment which is partly for work done and partly for sidewalk work never performed is not void: *Blair v. Luning*, 76 Cal. 134. The fact that a contractor has done work not called for by the contract and resolution of intention, and has demanded payment therefor, will not invalidate assessments for work called for by the contract, where the apportionment of assessments for the work not called for is separate from the apportionment for that called for, and where the demands for apportionment are separately made: *McDonald v. Mezes*, 107 Cal. 492. Where an act prescribes that if a contractor fails to complete the work

within the contract time the board shall relet the contract, the board cannot grant him an extension of time: *Beveridge v. Livingston*, 54 Cal. 54. Where a contractor abandons his contract before completion he is not entitled to any assessment thereunder: *Connolly v. San Francisco* (Cal.), 33 Pac. Rep. 1109; *Kelso v. Cole*, 121 Cal. 121. The street superintendent's failure to record the contract held not to affect the contractor's right to enforce an assessment: *Wells v. Wood*, 114 Cal. 255. Where the statute prescribes no particular time after the acceptance of the work within which the street superintendent shall issue the assessment and warrant therefor, the mere lapse of time for more than the period fixed as the duration of the lien is not a bar to issue: *Williams v. Bergein*, 116 Cal. 56. Under a statute providing that the auditor must be satisfied, before countersigning a street assessment warrant, that the proceedings have been "legal and fair," held that the word "fair" must be regarded as surplusage, as it could not have been intended to give the auditor power to refuse to sign on his own notion of fairness though the proceedings may have been legal: *Wood v. Strother*, 76 Cal. 545. A demand on an abutting owner for payment of an assessment may be made by a contractor who has assigned the contract as security for a loan, since the title is in the contractor: *Foley v. Bullard*, 99 Cal. 516. As to the requisites of such a demand, see *Schirmer v. Hoyt*, 54 Cal. 280; *Donnelly v. Howard*, 60 Cal. 291; *Alameda Macadamizing Co. v. Williams*, 70 Cal. 534. Failure to appeal to the board of supervisors does not bar the taxpayer from defending a suit to

show that where such is the law the city becomes liable to the contractor only in case its officers have, through bad faith or

recover the assessment: *Donnelly v. Howard*, 60 Cal. 291.

Colorado. A municipal corporation which contracts to pay for street improvements by assessments upon abutting property is primarily liable to pay the contract price itself if it has no power to make such assessments, or if it fails to make them, or if the assessments it attempts to make are void: *Barber Asphalt Co. v. Denver*, 72 Fed. Rep. 336, 19 C. C. A. 139.

Illinois. Under a contract to look only to the special assessment, the contractor has no other remedy, providing the city is in good faith, and with reasonable diligence, proceeding to make collections by means of such assessments: *Chicago v. People*, 48 Ill. 416. But if the city has no power to make such an assessment, and the improvement has been made without any express contract, the city is liable, upon an implied contract, to pay in the usual way, notwithstanding it was understood the contractor should rely on an assessment: *Maher v. Chicago*, 38 Ill. 266. See, also, *Chicago v. People*, 56 Ill. 327. As a contractor who has made improvements that by law are to be paid for by a tax on contiguous property benefited is not entitled to have a tax enforced beyond the benefits accruing to the property on which it is levied, his rights are not abridged by an amendment of the law changing the procedure by which the amount of such benefits is determined: *Palmer v. Danville*, 166 Ill. 42.

Indiana. A city's statutory liability to a contractor for the value of street improvements arises only when the city has issued and sold bonds to pay for such improvements, or has collected assessments made

for that purpose against the property benefited: *Porter v. Tipton*, 141 Ind. 347. Where the charter provides that the city shall be liable for the paving of so much of the street as is occupied by streets or alleys crossing the same, and that the contractor must look to the owners of the bordering lands for the remainder, *held*, that if the contractor failed to collect from these proprietors, he could not recover the amount from the city: *New Albany v. Sweeney*, 15 Ind. 245. See, also, *Johnson v. Indianapolis*, 16 Ind. 227. As to the date to be inserted in pay certificates issued to contractor for building of gravel and macadamized roads, see *State v. Frazier*, 113 Ind. 267. *Mandamus* lies to compel municipal officers to proceed so as to enable contractor to collect amount due him from property owners: *Greenfield v. State*, 113 Ind. 597. Averments in petition for such *mandamus*: *Ibid.* Affidavit for precept to collect: *Ibid.* Right of assignee of contractor to enforce collection: *Taber v. Ferguson*, 109 Ind. 227. Contractor's right not affected by defects or irregularities prior to the making of the contract: *Wiles v. Hoss*, 114 Ind. 371; *Sims v. Hines*, 121 Ind. 534. Previous demand not necessary to entitle contractor to foreclose assessment: *Sloan v. Faurot*, 11 Ind. App. 689; *Myers v. Railroad Co.*, 12 Ind. App. 170; *Lewis v. Albertson*, 23 Ind. App. 147. Lien for proper proportion of assessment: *Trustees v. Rausch*, 123 Ind. 167.

Iowa. If a city agrees to collect the assessment and fails to do so it is liable: *Morgan v. Dubuque*, 92 Iowa 433. If a city issues to contractors who have built a sewer, certificates of assessments which are void because against state property, the

otherwise, so failed in their duty in respect to the assessment as to defeat or prejudice collection by him.

city is liable to them for the amount: *Polk County Savings Bank v. State*, 69 Iowa 24. Where a contract provided for the issue of assessment certificates on the completion of any full block for the work so completed, each completed block became a separate taxing district, and the whole contract need not be performed before the cost of each such district became due, but each assessment became wholly due when made, unless the owner had obtained the right to pay in instalments: *Tuttle v. Polk*, 92 Iowa 433.

Kansas. When, before ordering an improvement, it was necessary that a petition should be presented by a majority of the resident property owners to be affected thereby; and that there should be a stipulation in the contract that the contractor should look to the property owners benefited for his pay, and that the city would not be liable, a contract was let without such petition being presented, and not containing the above stipulation; it was held that the contractor, after failing to collect the amount from the property holders, could not make the city liable for the amount: *Leavenworth v. Rankin*, 2 Kan. 357. But the city is primarily liable to a contractor for grading, and, unless it levies a valid tax and provides some means for enforcing it against the lot-owners, it will remain liable: *Leavenworth v. Mills*, 6 Kan. 288. A city of the second grade may issue bonds and pledge its faith and credit for their payment in order to pay contractors for improvements, though it might agree simply to lay a special assessment or tax, and leave the contractor to look to that: *Wyandotte v. Zeitz*, 21 Kan. 649. By the terms of a paving contract the city was to pay by

levying a special tax upon abutting property, and the contractors were to look only to the tax for their pay. In making the apportionment the city engineer committed an error. As soon as discovered it was corrected by a reapportionment. While the tax was being collected under the reapportionment the contractors sued the city. *Held*, the action would not lie; they must look to the tax for their pay: *Casey v. Leavenworth*, 17 Kan. 189.

Kentucky. When the contractor has agreed to take and collect the assessments as his pay, he cannot hold the city liable, unless it may be in cases where the whole proceedings are void, or the city neglects its duty; as where it fails to observe the requirements of the charter necessary to make the lot-owners liable: *Kearney v. Covington*, 1 Met. (Ky.) 339. For a case of very peculiar contract, see *Louisville v. Henderson*, 5 Bush 515. Under a charter providing that a city should not be liable to contractors for street improvements except when it may enforce payment from the property benefited, it is held that, inasmuch as the city has implied power to make such improvements, if it is without legal means to enforce payment therefor, it will be liable itself: *Louisville v. Nevin*, 10 Bush 549. But the fact that the council, when having power to compel payment, has either by affirmative action or neglect rendered enforcement of payment from the property impossible, will not impose the liability upon the city: *Craycraft v. Selvage*, 10 Bush 696. A city having authority to contract for the construction of a street, but no authority to make the cost a charge on abutting school property, is liable to the contractor

It is in general no defense to an assessment that the contract for the work has not been performed according to its terms.¹ If the proper authorities have passed upon the question and accepted the work as satisfactory, the acceptance must be con-

for such cost: *Louisville v. Leatherman*, 99 Ky. 213. Where its charter provides that a city shall not be liable to the contractor on its failure to take the proper steps to bind the property owners assessed for a public improvement, the city is not liable, in case the apportionment between the property owners is invalid, for interest from the time of such invalid assessment until a valid one is made, though the contractor loses the interest thereby: *Louisville v. Nevin* (Ky.), 28 S. W. Rep. 499.

Louisiana. When the contractor for a public work loses his remedy against the land, by reason of the neglect of the authorities to give the proper notice to the owner, or of other fault on their part, an action may be maintained against the municipality for the contract price: *Boulogny v. Dormenon*, 2 Mart. (La.) N. S. 455; *Newcomb v. Police Jury*, 4 Rob. (La.) 233; *O'Brien v. Police Jury*, 2 La. An. 355; *Michel v. Police Jury*, 3 La. An. 123; *Same v. Same*,

9 La. An. 67. If the municipality contracts with a paver that lot proprietors shall pay a certain portion of the cost of the pavement, and they refuse or neglect to do so, the municipality is liable: *Cronan v. Municipality No. 1*, 5 La. An. 537. So, if by contract the municipality is to pay one-third the cost of a work and the lot-owners two-thirds, but, by suit, it is determined that the lot-owners can be charged one-third only, the municipality is liable for the two-thirds: *Fournier v. Municipality No. 1*, 5 La. An. 298. As to suits in the name of the corporation for the benefit of the contractor, see *New Orleans v. Wire*, 20 La. An. 500.

Maryland. Where artesian wells were ordered on a petition, the order reciting: "The petitioners to be responsible for all expenses that may occur in sinking said artesian wells, if a failure should take place in the attempt to procure water," it was held the contractors must look to

¹ *Haley v. Alton*, 152 Ill. 113; *Shannon v. Hinsdale*, 180 Ill. 202; *De Puy v. Wabash*, 133 Ind. 336; *Robinson v. Valparaiso*, 136 Ind. 616; *Kelly v. Chadwick*, 104 La. 719; *Baltimore v. Raymo*, 68 Md. 569; *Fass v. Seehawer*, 60 Wis. 525. The inadequacy of a culvert to conduct the stream for which it was built, or its insufficient construction, cannot be reviewed in proceedings to enjoin the collection of assessments on the adjoining property for the expense of it: *Murphey v. Wilmington*, 5 Del. Ch. 281. A tax for cleaning a drain cannot be attacked because contractors required by their contract merely to clear the

drain have widened it: *Angell v. Cartright*, 111 Mich. 223. Failure to complete an improvement within the contract time is not a defense to an assessment where the municipal authorities have waived the delay: *Levi v. Coyne* (Ky.) 57 S. W. Rep. 790; *Baltimore v. Raymo*, 68 Md. 569; *Cass Farm Co. v. Detroit*, 124 Mich. 433. See *Hadley v. Dague*, 130 Cal. 207. As to the right to make modifications while the work is in progress see *Shreve v. Cicero*, 129 Ill. 226; *Hastings v. Columbus*, 42 Ohio St. 585; *Wewell v. Cincinnati*, 45 Ohio St. 407.

clusive: there cannot and ought not to be an appeal from them to court or jury. "No misconstruction or malconstruction of the work, arising from the incapacity, the honest mistake, or the fraud of the contractor would invalidate the as-

the petitioners, and not to the city: *Ruppert v. Baltimore*, 23 Md. 184.

Massachusetts. When the contractor for a dike was to be paid from assessments, and after their payment the town was, by statute, liable, it was held there was no liability until such payment: *Hendrick v. West Springfield*, 107 Mass. 541.

Michigan. When, by law and by his contract, the contractor is to look only to a special fund raised by assessment for his compensation, he cannot hold the city liable in the absence of any negligence in levying or collecting the assessment. See *Goodrich v. Detroit*, 12 Mich. 279; *Second National Bank v. Lansing*, 25 Mich. 207. Where the contract price is to be paid only from an assessment fund, a suit against the city to determine the sum to be paid does not render it liable generally, but only as the contract provides: *Detroit v. Paving Co.*, 36 Mich. 335. Compare *United States v. Fort Scott*, 99 U. S. 152. But the city is liable if it misappropriates the special fund: *Chaffee v. Granger*, 6 Mich. 51; *Lansing v. Van Gorder*, 24 Mich. 456.

Minnesota. Where the contractor binds himself to look to the property owners for his pay, but fails to do so, the city is not liable even though it has taken ineffectual steps to make collections from the property owners: *Lovell v. St. Paul*, 10 Minn. 290.

New York. Where, by city charter, the contractor for a city work is to be paid from an assessment levied for the purpose, he cannot maintain a suit against the city before the assessment is collected, in the absence of default on the part of the officers

to proceed therewith: *Hunt v. Utica*, 18 N. Y. 442. See *Beard v. Brooklyn*, 31 Barb. 142; *Swift v. Williamsburg*, 24 Barb. 427. If the city does not proceed with reasonable diligence to collect the assessment, and turn over the proceeds to him, he may proceed by *mandamus* to compel such action on its part: *Ready v. Syracuse*, 144 N. Y. 63. But where a municipality disables itself from performing the contract by such action on its part as makes void, and therefore uncollectible, an assessment for the purpose of providing compensation, or refuses to perform the contract on its part, then the contractor may maintain an action against it for the damages sustained by reason of its failure to perform the contract: *Reilly v. Albany*, 112 N. Y. 30. And where the municipality formally declares that an executed contract for a local improvement has been abandoned, and refuses to levy an assessment to pay the price, the contractor may sue therefor, although the contract provides that no payment shall be made until the cost is collected by assessment: *Weston v. Syracuse*, 158 N. Y. 274. Where a contractor has forfeited his bond and the work has been relet at an enhanced price, it has been held that it is the city's duty to enforce the bond and apply the recovery before laying an assessment: *Eno v. New York*, 68 N. Y. 214.

Ohio. If the contractor takes an assignment of the assessment in payment, he cannot look to the city to make up any deficiency in consequence of assessments exceeding the value of lots: *Creighton v. Toledo*, 18 Ohio St. 447. For a statutory change in this regard, see *Cincinnati*

assessment, or relieve the parties assessed from the obligation to pay it. In this respect the property owners, assessed under the provisions of the law for the cost of a sewer, must stand upon the same footing with parties assessed for taxes for the public

v. Diekmeier, 31 Ohio St. 242. And see, in general, *Hastings v. Columbus*, 42 Ohio St. 585.

Oregon. Where a contractor for work on a street buys land assessed for the work, and pays therefor by city warrants received for the work, he cannot recover from the city the amount of the warrants on the ground that it had no power to levy the assessment: *Keenan v. Portland*, 27 Or. 544. A stipulation in a contract by a city for a public improvement that the contractor shall look for payment to a particular fund, to be raised by assessment, does not relieve the city from liability for negligently delaying to raise such fund: *Commercial Nat. Bank v. Portland*, 24 Or. 188; *Little v. Portland*, 26 Or. 235.

Pennsylvania. Where a city contracts for a sewer to be paid out of the general fund and assessments, it is liable for the whole sum, though it collects only part of the assessment because the assessment on non-abutting property has been held bad: *Addyston Pipe, etc. Co. v. Corry*, 197 Pa. St. 41. A city which did not in fact have any authority to make assessments for paving (the statute authorizing such assessments being unconstitutional) was held liable on the contract for the work though it was stipulated that the assessments should be accepted in payment, and that the city should not be liable otherwise under the contract, whether the assessments were collectible or not. *Barber Asphalt Paving Co. v. Harrisburg*, 64 Fed. Rep. 283, 12 C. C. A. 100.

Washington. There is no general liability on a city's part either for

principal or interest on warrants issued to a contractor on local improvement funds, in the absence of a specific contract on the city's part, or the city's actual collection and misappropriation of the funds from the local assessment: *Potter v. New Whatcom (Wash.)*, 65 Pac. Rep. 197, practically overruling *Philadelphia Mortg. & T. Co. v. New Whatcom*, 19 Wash. 225. And see *Thomas & Co. v. Olympia*, 12 Wash. 465; *Stephens v. Spokane*, 14 Wash. 298; *McEwan v. Spokane*, 16 Wash. 212; *German Amer. Sav. Bank v. Spokane*, 16 Wash. 698; *Seavey v. Seattle*, 17 Wash. 361; *Northwestern Lumber Co. v. Aberdeen*, 20 Wash. 102; *Tacoma Bituminous Pav. Co. v. Sternberg (Wash.)*, 66 Pac. Rep. 121. Where a city expressly covenants in reference to providing a fund for payment of street-grade warrants that it will prosecute the business of buying and collecting the special tax or assessment without any delay, etc., it and not the contractor must look after the assessment and enforce the collection of it: *McEwan v. Spokane*, 16 Wash. 212. Where a contract for public improvements provided for an assessment to pay the warrants drawn in favor of the contractor, the council had no right thereafter to provide for the payment of the assessments in instalments extending over a period of years: *German-Amer. Sav. Bank v. Spokane*, 16 Wash. 698.

Wisconsin. When the contractor is to be paid by certificates, showing the amount chargeable to each lot, which are to be collected as a tax, he cannot maintain an action against the city, but must depend on

benefit. They take the hazard incident to all public improvements, of their being faulty or useless, through the incapacity or fraud of public servants."¹ But this doctrine must be confined within its proper limits; it cannot be extended to cover a

the collection of the certificates: *Whalen v. La Crosse*, 16 Wis. 271; *Finney v. Oshkosh*, 18 Wis. 209; *Fletcher v. Oshkosh*, 18 Wis. 232. See *Heller v. Milwaukee*, 96 Wis. 134. The failure of a contractor to complete his work in time cannot be taken advantage of by a lot-owner to defeat a sale unless he can show he was injured thereby: *Fass v. Seehawer*, 60 Wis. 575.

District of Columbia. The neglect of municipal officers to take reasonably the steps necessary under the statute to create a lien on lots for the cost of setting a curb in front thereof renders it liable for the amount of certificates of indebtedness issued by the mayor to the contractor for deferred instalments: *District of Columbia v. Lyon*, 161 U. S. 200.

¹ *Green*, Chancellor, in *State v. Jersey City*, 29 N. J. L. 441, 449. See, also, *Emery v. Bradford*, 29 Cal. 75; *Cochran v. Collins*, 29 Cal. 129; *Taylor v. Palmer*, 31 Cal. 240; *Dougherty v. Miller*, 36 Cal. 83; *Diggins v. Hartsborn*, 108 Cal. 154; *Ricketts v. Hyde Park*, 85 Ill. 110; *Murray v. Tucker*, 10 Bush 240; *Henderson v. Lambert*, 14 Bush 24; *Nevin v. Roach*, 86 Ky. 492; *Joyes v. Shadburn (Ky.)*, 13 S. W. Rep. 301; *Allen v. Woods (Ky.)*, 45 S. W. Rep. 106; *Municipality v. Guillotte*, 14 La. An. 297; *Baltimore v. Raymo*, 68 Md. 569; *Motz v. Detroit*, 18 Mich. 515; *Dixon v. Detroit*, 86 Mich. 516; *Harper v. Grand Rapids*, 105 Mich. 551; *Cass Farm Co. v. Detroit*, 124 Mich. 433; *Warren v. Barber Asphalt Co.*, 115 Mo. 572; *Chance v. Portland*, 26 Or. 286. In *Emery v. Bradford*, *supra*, *Sawyer, J.*, says: "In this case the contract is admitted by the pleadings to have been performed to the satisfaction of the

superintendent. It was a duty devolved upon that officer to determine that question of fact, and he did determine it. There is no fraud charged—nothing but an error in judgment. The law afforded the defendant a remedy in the regular course of the proceeding itself, by which he might have had the error reviewed, and the defect, if any, remedied. He did not avail himself of the remedy, but declined to appeal, and now seeks to review the determination of the superintendent collaterally. We think, by this neglect to appeal, he has acquiesced in the approval of the work by the superintendent, and that his determination is conclusive. The principles applicable to the review of assessments of other taxes would apply here, and such would be the result in respect to ordinary taxes for state, county, and municipal purposes. *Conlin v. Seaman*, 22 Cal. 549; *Peoria v. Kidder*, 26 Ill. 358; *Aldrich v. Cheshire R. R. Co.*, 1 Foster, 361; *Hughes v. Kline*, 30 Pa. St. 230, 231; *Sandford v. New York*, 33 Barb. 150; *Lowell v. Hadley*, 8 Met. 194; *Williams v. Holden*, 4 Wend. 227, 228; *Bouton v. Neilson*, 3 Johns. 475, 476; *Windsor v. Field*, 1 Conn. 284. It was decided in *Nolan v. Reese*, 32 Cal. 484, that fraud in letting the contract was no defense to an assessment. It might doubtless be a reason for enjoining the execution of the contract, on a bill filed in due season." In *Seaboard Nat. Bank v. Woesten*, 147 Mo. 467, it was held that a taxpayer could not object to a local assessment in favor of a contractor for fraud of municipal officers in letting the contract, where it was not let in violation of

case in which the authorities, after contracting for one thing, have seen fit to accept something different in its place; for if this might be done, all statutory restraints upon the action of local authorities in these cases would be of no more force than they should see fit to allow them.¹ And no doubt if it were claimed that by fraud the cost of a work was purposely made excessive, the fact might be inquired into and redress obtained, either in a direct proceeding for the purpose, or on appeal if a competent appellate tribunal was provided.²

Lien of assessment; sale; suit. It is very proper in statutes for the levy of special assessments to declare that the sum assessed in respect to each lot or parcel of land shall be a lien upon it; and this declaration is generally made.³ It is also

the city charter, and the contractor did not participate in the fraud.

¹ Ricketts v. Hyde Park, 85 Ill. 110; Church v. People, 174 Ill. 366; People v. Whidden, 191 Ill. 274; Gage v. People, 193 Ill. 316; Murray v. Tucker, 10 Bush 240; Henderson v. Lambert, 14 Bush 24; Scranton v. Bush, 160 Pa. St. 499. A special assessment for a street improvement must be that specified in the contract for the improvement: Schneider v. District of Columbia, 7 Mackey 252.

² Matter of Orphan Home, 92 N. Y. 116. See Green v. Shanklin, 24 Ind. App. 608; Matter of Righter, 92 N. Y. 111. In California by statute fraud is now a defense to an assessment: Brady v. Bartlett, 56 Cal. 350. It is no defense to an assessment for opening a street that certain city officers were interested in the contract: Schenley v. Commonwealth, 36 Pa. St. 29. Errors in the legislation of the city give no ground for restraining the collection of an assessment: Robinson v. Milwaukee, 61 Wis. 485.

³ Assessments for local improvements are not liens unless made such by express statute: Eagle Manuf. Co. v. Davenport, 101 Iowa 493. The legislature may make the cost of highway improvements assessed

upon the real estate an immediate lien thereon: Bauman v. Ross, 167 U. S. 548. A statute providing that an assessment for a local improvement shall be a lien upon the lands named therein, and if delinquent may be enforced by sale, is held constitutional in Arkansas: School District v. Board of Improvement, 65 Ark. 343. In People v. Brooklyn, 4 N. Y. 419, the assessment was made upon "the owners and occupants of all the lands benefited thereby, in proportion to the amount of such benefit." It was made a lien on the land, but was to be collected of the owner's personalty, and if none, then of the land. In Louisiana the lien of an assessment for street paving attaches to the property of the abutting proprietor without reference to the person in whom title is absolutely vested: Rosetta Gravel, etc. Co. v. Jollisaint, 51 La. An. 804. When the assessment is on land, irrespective of the value of buildings, the lien nevertheless affects the buildings: Wright v. Boston, 9 Cush. 233. Unpaid special assessments held not to be a lien on other lands of the owner of the property benefited: Hutchinson v. Rochester, 92 Hun 393. The separate estate of a

common to provide for a sale of the lands when necessary for the satisfaction of the assessment, sometimes with and sometimes without judicial proceedings for the purpose. Special provision for such sale is requisite, since the customary authority to sell lands for the satisfaction of taxes has no application to these proceedings.¹ When suit is provided for it is likely to

married woman is subject to the lien: *Leavenworth v. Stille*, 13 Kan. 539. As to when the lien attaches, see *Lyon v. Alley*, 130 U. S. 177; *Sanders v. Brown*, 65 Ark. 498; *Dann v. Woodruff*, 51 Conn. 203; *Scott v. State*, 89 Ind. 368; *Eagle Manuf. Co. v. Davenport*, 101 Iowa 493; *Dowd-ney v. Mayor*, 54 N. Y. 156. An assessment may by statute be made a lien upon the property with precedence over a mortgage executed before the improvement was made: *Morey v. Duluth*, 75 Minn. 221. See *Burke v. Lukens*, 12 Ind. App. 648; *Dressman v. Farmers' & T. Nat. Bank*, 104 Ky. 694; *Dressman v. Semonin* (Ky.), 47 S. W. Rep. 767; *Seattle v. Hill*, 14 Wash. 487. In Indiana a previous mortgage has priority over the lien of a drainage assessment: *Cook v. State*, 101 Ind. 446; *State v. Aetna L. Ins. Co.*, 117 Ind. 251; *Pierce v. Aetna L. Ins. Co.*, 131 Ind. 284; *State v. Lovelace*, 133 Ind. 600. A lien for an assessment for paving a street does not displace a prior lien for curbing such street: *Des Moines Brick Manuf. Co. v. Smith*, 108 Iowa 307. The foreclosure of a junior street-assessment lien does not extinguish prior liens of the same kind if holders of such prior liens are not made parties to the foreclosure suit: *Wood v. Brady*, 68 Cal. 78. The fact that an assessment is invalid does not remove the lien upon the lands for the cost of a sewer. The errors may be corrected and the amount re-assessed: *Smith v. Abington Savings Bank*, 171 Mass. 178. Where an assessment for widening a street is made a lien on the lot in the nat-

ure of a mortgage, with authority in the city to sell for its satisfaction, and a sale is made which is void, and money refunded, the lien remains, and the sale is no bar to further proceedings to collect: *New York v. Colgate*, 12 N. Y. 149. *Held*, in the same case, that a lien is not barred sooner than a mortgage would be. Where an assessment is not utterly void a general decree quieting title will not be granted, as a lien may be established on the land though no title passes under the sale for the assessment: *Jackson v. Smith*, 120 Ind. 520. A deposit of the amount of an assessment lien against property pending appeal from the assessment held not to be a payment of the lien: *Murtland v. Pittsburgh*, 189 Pa. St. 371. The fact that a separate lien for the cost of laying a sidewalk is filed against each of the lots in a block does not affect the validity of the lien, nor is it error to refuse to consolidate the suits brought to enforce the liens on defendant's separate lots, where the court orders the trial of one case as the test of all: *Maple v. Beltzhoover Borough*, 130 Pa. St. 335. As to liens, see, also, *Emery v. Bradford*, 29 Cal. 75; *Walsh v. Matthews*, 29 Cal. 123; *McMasters v. Commonwealth*, 3 Watts 292; *Philadelphia v. Tryon*, 35 Pa. St. 401; *Schenley v. Commonwealth*, 36 Pa. St. 29.

¹ *Sharp v. Speir*, 4 Hill 76. To the same point are *McInerny v. Reed*, 23 Iowa 410; *Merriam v. Moody's Executors*, 25 Iowa 163; *Paine v. Spratley*, 5 Kan. 525; *Leavenworth v. Laing*, 6 Kan. 274. In some of the states these

be one of a peculiar character, and it may be either a suit *in rem* or a suit *in personam*, or a suit partaking of the nature of both.¹ We have seen that under some statutes the assessment or list when completed is handed over to the contractor for the

assessments are by statute made collectible in the same manner as the ordinary taxes. See *Morrison v. Hershire*, 32 Iowa 271; *Sanger v. Rice*, 43 Kan. 580. An assessment for a public improvement cannot be collected in a summary method by lien on the property benefited, and by sale thereon, unless there is strict statutory authority therefor. If no such summary remedy is given the quota apportioned to each individual becomes a debt to be recovered in due course of law: *State v. Beverly Common Council*, 53 N. J. L. 560. Under a statute providing that any judgment recovered for a drainage assessment may be enforced and collected as other judgments in the same court, a decree authorizing a master in chancery to sell the lands assessed in the event of non-payment of the amount due is proper: *Samuels v. Drainage Com'rs*, 125 Ill. 536. Under the California statutes a notice for the sale of land for the payment of street assessment bonds was held defective because not containing the names of the defective owners: *Ellis v. Witmer (Cal.)*, 66 Pac. Rep. 301. Lots in an addition to a city cannot be sold to satisfy a delinquent special assessment levied on lots in another addition belonging to the same owner: *Dempster v. People*, 158 Ill. 36. As to the necessity of selling each lot by itself for the sidewalk tax against it, see *Royce v. Aplington*, 90 Iowa 352. If a city treasurer in making sale to enforce special assessments sells a lot for less than the full amount of the judgment as appears in the process, and the certificate of sale shows the fact, the purchaser acquires no right in the

property as against the true owner: *Security Trust Co. v. Von Heyderstaedt*, 64 Minn. 409. A city authorized by its charter to purchase and dispose of property for the public benefit may, where property is sold for assessments, bid, in the absence of other purchasers, up to the extent of its charges against the property: *New Whatcom v. Bellingham Bay Imp. Co.*, 16 Wash. 131. Where lands are sold for an assessment the purchaser has the burden of showing a regular sale, unless the statute provides otherwise: *Dederer v. Voorhies*, 81 N. Y. 153. A certificate issued on a sale of land for non-payment of an assessment of benefits for a street improvement is a "tax-certificate" within the meaning of a statute limiting the time for actions upon tax-certificates: *Pratt v. Dalrymple*, 93 Wis. 658. The right to redeem is conferred by necessary implication, not only as to execution sales for assessments for the paving and improvement of streets after they have been graded, but also to enforce judgments for benefits assessed in street-grading cases: *Bryant v. Russell*, 127 Mo. 422.

¹ The proceeding for the enforcement of a lien for a local improvement is one *in rem*, notwithstanding the title-holder be cited: *Rosetta Gravel, etc. Co. v. Jollisaint*, 51 La. An. 804. A proceeding to enforce a special tax-bill under a statute providing for the issue of special tax-bills for local assessments is in the nature of an action *in rem*, and compulsory payment can be enforced only by a sale of the property assessed, as such assessments cannot be upheld except upon the ground of benefits to such property: *Clinton*

work, who proceeds to enforce the lien in his own favor.¹ But whether collection is to be made by the contractor or by the municipality, the statute must be the guide in respect to the proceedings.²

v. Henry County, 115 Mo. 557. Judgments for special taxes are *in rem* and can only operate against the particular tract or lot of land against which the taxes were assessed; therefore a single judgment for the sum of the assessments against two or more separate parcels is void, being an attempt to subject each lot to payment of the taxes on both: Hoover v. People, 171 Ill. 182. Further as to proceedings *in rem*, see *ante*, pp. 875-899.

¹ *Ante*, pp. 1277-1283. See, also, Taylor v. Palmer, 31 Cal. 240; Chambers v. Satterlee, 40 Cal. 497; Northern Indiana R. Co. v. Connelly, 10 Ohio St. 159. A property owner's obligation to pay a tax for street improvements is not affected by the contractor's omission to enforce collection against other property: Phelan v. San Francisco, 120 Cal. 1. Inclusion through error in a special-tax bill of a sum for which there was no contract will not invalidate it, and the contractor may collect what was due him: Neenan v. Smith, 60 Mo. 292.

² As to the necessity in California that the proceedings follow the statute, see Himmelmann v. Townsend, 49 Cal. 150; Hancock v. Bowman, 49 Cal. 413; Witter v. Bachman, 117 Cal. 318. And as to the necessity in Illinois of complying with the statutory provisions in regard to the proceedings prior to judgment and sale for unpaid special taxes,—*e. g.*, the city clerk's report of lots against which such taxes remain unpaid, see Hoover v. People, 171 Ill. 182. A special statutory tax-lien for a street improvement cannot be enforced on a *quantum meruit* against the property benefited, but must in all cases

be enforced by means of valid proceedings authorizing the assessment: Galbreath v. Newton, 30 Mo. App. 380. As to enforcing an assessment against a county, see McLean County v. Bloomington, 106 Ill. 209. As to the collection of an assessment in Maryland, where the land has been sold while the work is in progress, see Wolff v. Baltimore, 49 Md. 446. In Ohio suit is authorized to recover special assessments, and when one is found irregular or defective judgment may be rendered for the amount properly chargeable: Gest v. Cincinnati, 26 Ohio St. 275. One who owns the fee of a street where it intersects a paved street is not a lot-owner within a charter which provides that the expense of paving in front of a lot may be recovered by a suit against the owner: Schenectady v. Union Coll., 144 N. Y. 241. Where property is pursued in enforcement of a local assessment, to secure which the statute grants the first lien, it suffices to proceed against the person in possession as owner under a recorded title: Kelly v. Mendelsohn, 105 La. 490. Where the statute provides that an action to foreclose a municipal assessment for street improvements must be brought against the "owners" of the land, when the owner dies, his heir or devisee, not his executor or administrator, is a necessary party defendant: Phelan v. Dunne, 72 Cal. 229. Where the statute requires that the owners of a lot shall be sued, the complaint need not specify the individual interests: Whiting v. Townsend, 57 Cal. 515. As to proceedings where several are joined as defendants and there is a discontinuance

Personal liability for assessments. It is customary not only to make the assessment a lien on the land, but also to make it a personal charge against the owner. There is some difficulty in principle in doing this; a difficulty which in some states has been found insurmountable, the courts holding that in principle, at least, it is not permissible.¹

as to some, see *Clark v. Porter*, 53 Cal. 409; *Diggins v. Reay*, 54 Cal. 525; *Harney v. Applegate*, 57 Cal. 205; *Parker v. Altschul*, 60 Cal. 380. The lessee of assessed property is not a necessary party to the assessment proceedings: *West Chicago St. R. Co. v. People*, 156 Ill. 18. As to proceedings where several tracts owned by same person are assessed for the same improvement, see *People v. Hagar*, 52 Cal. 171. If two lots owned by the same person are separately assessed, each lot is liable for its own assessment only, and a judgment to enforce the lien must distinguish between them: *Brady v. Kelly*, 52 Cal. 371. As to proceedings where there are two separate assessments on the same lots, see *Dyer v. Barstow*, 50 Cal. 652. If two assessments are made for the same improvement by reason of the insufficiency of the first to cover the cost, both may be proceeded for in one suit: *District No. 110 v. Feck*, 60 Cal. 403. In Ohio it is error, in an action to recover an assessment on two parcels owned by the same person, to charge one lot with the assessment on both: *Corry v. Folz*, 29 Ohio St. 320. In Missouri, in a suit on a special-tax bill for a street improvement, the bill is *prima facie* evidence that a public street exists where the improvement was made, but this may be disputed: *Seibert v. Allen*, 61 Mo. 482. And such a bill, being by statute *prima facie* evidence, when properly certified, of the validity of the charges against the property and of the owner's liabil-

ity, need not expressly show the computation upon which the tax was apportioned: *St. Joseph v. Farrell*, 106 Mo. 437. In an action to enforce a lien against land for a local assessment authorized by statute, no question as to the benefit or injury resulting to the land from the improvement can be raised: *Moberly v. Hogan*, 131 Mo. 19. In the state of Washington, it is not necessary for a city, under the presumptions raised by its charter, to go further in a special assessment for foreclosure than the production of an assessment roll regular on its face, in order to make out a *prima facie* case: *Seattle v. Smith*, 8 Wash. 387. As to paying an assessment from funds in court, see *Gould v. Baltimore*, 59 Md. 378.

¹ See *Taylor v. Palmer*, 31 Cal. 240, 254; *Manning v. Den*, 90 Cal. 610; *Craw v. Tolono*, 96 Ill. 255; *Virginia v. Hall*, 96 Ill. 278; *People v. Dragstran*, 100 Ill. 286; *Illinois Cent. R. Co. v. Commissioners*, 129 Ill. 417; *Illinois Cent. R. Co. v. People*, 170 Ill. 224; *Hoover v. People*, 171 Ill. 182; *Leeds v. De Frees (Ind.)*, 61 N. E. Rep. 930; *Meyer v. Covington*, 103 Ky. 546; *Barker v. Southern Const. Co. (Ky.)*, 47 S. W. Rep. 608; *Barber Asphalt Paving Co. v. Watt*, 51 La. An. 1345; *Moody v. Chadwick*, 52 La. An. 1888; *Macon v. Patty*, 57 Miss. 378; *Neenan v. Smith*, 50 Mo. 525; *Carlin v. Cavender*, 56 Mo. 286; *St. Louis v. Bressler*, 56 Mo. 350; *Louisiana v. Miller*, 66 Mo. 467; *Higgins v. Ausmuss*, 78 Mo. 351; *Clinton v. Henry County*, 115 Mo. 557; *State v. Augert*,

In the case of the ordinary taxes no sufficient reason exists why those on lands should not be made a personal charge against the owner, if he is a resident and has the usual opportunity to be heard. The taxes are not so much assessed in

127 Mo. 456; *In re Hun*, 144 N. Y. 472; *Ivanhoe v. Enterprise*, 29 Or. 245; *Wolf v. Philadelphia*, 105 Pa. St. 25; *McKeesport v. Fidler*, 147 Pa. St. 532; *Green v. Ward*, 82 Va. 324; *Asberry v. Roanoke*, 91 Va. 562; *Seattle v. Yesler*, 1 Wash. 571. *Bliss, J.*, in *Neenan v. Smith*, 50 Mo. 525, 528, said: "There is a wide distinction, and one of universal recognition, between the foundation upon which is based the right of general taxation for governmental purposes, and that which supports the right of local assessments. The authority to impose either is referred to the taxing power; but the object of one, as giving the authority, widely differs from that of the other. All taxation is supposed to be for the benefit of the person taxed. That for raising a general revenue is imposed primarily for his protection as a member of society, both in his person and his property in general, and hence the amount assessed is against him, to be charged upon his property, and may be collected of him personally. But, on the other hand, local taxes for local improvements are merely assessments upon the property benefited by such improvements, and to pay for the benefits which they are supposed to confer; the lots are increased in value, or better adapted to the uses of town lots, by the improvement. Upon no other ground will such partial taxation for a moment stand. Other property held by the owner is affected by this improvement precisely and only as is the property of all other members of the community, and there is no reason why it should be made to contribute, that does not equally apply to that of all others.

The sole object, then, of a local tax being to benefit local property, it should be a charge upon that property only, and not a general one upon the owner. The latter, indeed, is not what is understood by local or special assessment, but the very term would confine it to the property in the locality; for, if the owner be personally liable, it is not only a local assessment, but also a general one, as against the owner. The reasonableness of this restriction will appear when we reflect that there is no call for a general execution until the property charged is exhausted. If that is all sold to pay the assessment, leaving a balance to be collected otherwise, we should have the legal anomaly—the monstrous injustice—of not only wholly absorbing the property supposed to be benefited and rendered more valuable by the improvement, but also of entailing upon the owner the loss of his other property. I greatly doubt whether the legislature has the power to authorize a general charge upon the owner of local property which may be assessed for its especial benefit, unless the owners of all taxable property within the municipality are equally charged. As to all property not to be so specially benefited, he stands on the same footing with others; he has precisely the same interests, and would be subject to no greater burdens." It was held in *Raleigh v. Peace*, 110 N. C. 32, that as assessments for local improvements are justifiable only on the theory that the land receives benefits equal to the assessments, a charter provision that personal judgments for such assessments may be

respect to the particular lands as the value of the particular lands is taken as the measure of the owner's duty to the state. He is not taxed in consideration of state protection to that particular item of property, but he is taxed for the general protection which the state affords to his life, his liberty, his family and social relations, his property, and the various privileges the law grants to him. If a tax measured by the property should, in its enforcement, take from him more than that property is worth, it would not follow that the state had taken beyond the equivalent rendered. Indeed, the contrary would be almost certainly the fact. It is different in the case of an assessment made upon the basis of benefits. Such an assessment regards nothing but the benefit that is to be conferred upon the particular estate. The levy is made on the supposition that that estate, having received the benefit of a public improvement, ought to relieve the public from the expense of making it. In such a case, if the owner can have his land taken from him for a supposed benefit to the land, which, if the land is sold for the tax, it is thus conclusively shown he has not received, and he then be held liable for a deficiency in the assessment, the injustice — not to say the tyranny — is manifest. But such a case is liable to occur if assessments are made a personal charge; and cases like it in principle, though less extreme in the injury they inflict, are certain to occur.

The cases are not uncommon in which, on a sale of lands for the payment of a special assessment for a drain or a levee, the whole estate assessed is sold and lost to the owner. Such instances may occur in the case of other improvements. If the statute allows a sale to the highest bidder, the land may be lost to the owner, leaving a balance of the assessment still uncollected. The loss of his lands is incident to a proper exercise of

taken against the abutting owners, thus allowing the assessments to be enforced against other property not benefited, violates the prohibition against taking property without compensation. In *McKeesport v. Fidler*, 147 Pa. St. 532, it was decided that *assumpsit* would not lie to enforce the collection of an assessment for a sewer, there being no statutory

provision therefor. It was held in *State v. Ætna L. Ins. Co.*, 117 Ind. 251, that the Indiana drainage act, which merely provides that the assessments for the construction of ditches shall be a lien on the lands benefited, does not create any personal liability against the land-owners.

the power of the government, and, though severe, can give him no ground for complaint. The assessors have perhaps erred in their judgment; but this may occur in any tax proceeding. The estate was lawfully charged with the supposed benefit, and the charge has been enforced. But where and what are the benefits to the individual for which he can be called upon to pay any deficiency after a sale of the estate? Unless the whole legal basis of these assessments has been misunderstood by the courts, it would seem that there are none whatever. But the practice of making these assessments a personal charge against resident owners has not been uncommon. The English statutes go so far as to make them a personal charge against "the present or any future owner of the property" assessed until paid.¹ In the United States, personal assessments of this nature have been enforced in a great number of cases.² How

¹ *Vestry of Bermondsey v. Ramsey*, Law Rep. 6 C. P. 247; *Plumstead Board of Works v. Ingoldsby*, Law Rep. 8 Exch. 63, 174.

² *Nichols v. Bridgeport*, 23 Conn. 190; *Hazzard v. Heacock*, 39 Ind. 172; *Louisville, N. A. & C. R. Co. v. State*, 122 Ind. 443; *Burlington v. Quick*, 47 Iowa 222; *Muscatine v. Chicago, R. L. & P. R. Co.*, 79 Iowa 645; *Dewey v. Des Moines*, 101 Iowa 416; *New Orleans v. Wire*, 20 La. An. 500; *Baltimore v. Howard*, 6 H. & J. 383; *Eschback v. Pitts*, 6 Md. 71; *Clemes v. Baltimore*, 16 Md. 208; *Dashiell v. Baltimore*, 45 Md. 615; *Lowell v. French*, 6 Cush. 223; *Le Fevre v. Detroit*, 2 Mich. 586; *Lovell v. St. Paul*, 10 Minn. 290; *Gilbert v. Havemeyer*, 2 Sand. 506; *Sharp v. Johnson*, 4 Hill 76; *Gouverneur v. New York*, 2 Paige 434; *Cumming v. Brooklyn*, 11 Paige 596; *Bleecker v. Ballou*, 3 Wend. 263; *McCulloch v. Brooklyn*, 23 Wend. 458; *Doughty v. Hope*, 3 Denio 253; *People v. Brooklyn*, 4 N. Y. 420; *Manice v. New York*, 8 N. Y. 120; *New York v. Colgate*, 12 N. Y. 141; *Bennett v. Buffalo*, 17 N. Y. 383; *Brewster v. Syracuse*, 19 N. Y. 118; *People v.*

Nearing, 27 N. Y. 308; *Litchfield v. McComber*, 42 Barb. 288; *Lake Shore & M. S. R. Co. v. Dunkirk*, 65 Hun 494; *Paterson v. Society, etc.*, 24 N. J. L. 385; *Hill v. Higdon*, 5 Ohio St. 243; *Ernst v. Kunkle*, 5 Ohio St. 529; *Reeves v. Wood County Treasurer*, 8 Ohio St. 333; *Creighton v. Scott*, 14 Ohio St. 439; *Northern Liberties v. St. Johns Church*, 13 Pa. St. 104; *Vacation of Centre St.*, 115 Pa. St. 247. Where a statute provides that a special assessment shall be a personal charge upon the owner and a lien on the lot, an ordinance laying the assessment is valid, which provides that it shall be paid by the property holders in proportion to frontage, nothing being said about its being a charge on the property: *Kendig v. Knight*, 60 Iowa 29. Under a statute providing that in making a special assessment the assessors shall make a certificate thereof, entering therein the names of the owners or occupants of the lands, and shall make a just assessment against said owners or occupants, and on the lands deemed benefited an assessment against the lands merely, and not against the owners or occupants,

much of this may be due to the fact that the right to make a personal assessment was not contested can only be matter of conjecture; but at present it must be conceded that the weight of authority is in favor of the right.¹

is void: *Felthousen v. Amsterdam*, 69 Hun 505, 23 N. Y. Supp. 424. An ordinance provided for collecting the cost of an improvement from the owners of the property benefited. By statute, the city was authorized to assess the cost of such improvements upon the property benefited, and to collect such assessments as other city taxes are collected. It was objected that the ordinance did not strictly pursue the power granted, as it directed the assessment to be made on the person. *Held*, that the assessment was "a personal debt to the extent of the property charged with the tax. The tax was intended to be, and is, a lien on the property; and the owner, to that extent, is answerable for its payment, as for a personal debt of any other kind; but we do not wish to be understood that his liability for that tax would extend beyond the value of the property taxed for the improvement:" *Moale v. Baltimore*, 61 Md. 224. The assessment may be collected by distress against the land itself, but in the absence of statute allowing it, *assumpsit* will not lie except against the person who was owner when the work was

done: *Wolff v. Baltimore*, 49 Md. 446. And see *Dashiell v. Baltimore*, 45 Md. 615. Where, under the statute, one whose name did not appear upon the assessment roll was not personally liable, and where a junior mortgagee acquired by foreclosure property which afterwards was assessed for improvements, his name, however, not being inserted in the record, and where, subsequently, the senior mortgagee foreclosed and acquired the property, it was held that the latter could not recover from the former the amount of the assessment paid: *Mutual L. Ins. Co. v. Sage*, 41 Hun 535.

¹ Rendition of personal judgment against an owner when the tax is at the same time a charge on the land is not in violation of the right to due process of law: *Davidson v. New Orleans*, 96 U. S. 96. But a state statute authorizing assessments for local improvements, and attempting to make the owner, a non-resident, personally liable for such assessment, fails, as to such personal liability, in the requirement of due process of law: *Dewey v. Des Moines*, 173 U. S. 193, reversing same case, 101 Iowa 416.

CHAPTER XXI.

LOCAL TAXATION UNDER LEGISLATIVE COMPULSION.

The general doctrine. In our discussions hitherto it has been assumed as a fundamental idea in republican government, that the people who are to pay the taxes must vote them, either directly or by their proper representatives. State taxes must be levied under laws passed by the legislature of the state, and local taxes under the votes of the people concerned, or their officers or agents duly authorized.

It has also been assumed that all local powers must have their origin in a grant by the state, which is the source and fountain of authority. The power to tax is no exception to this general rule. Every municipal corporation, and every political division of the state which demands taxes from the people, must be able to show due authority from the state to make the demand.¹ The authority in some cases is conferred by the state constitution, but if not found there it must be given by legislative enactment. No person is compellable to pay taxes for imposing which the authorities are unable to show a legislative grant of power.²

If local powers of taxation must come from the state, it might seem to follow as a corollary that the state could at pleasure withhold the grant and exercise the power itself. But in the general framework of our republican governments, nothing is more distinct and unquestionable than that they recognize the existence of local self-government, and contemplate its permanency. Some state constitutions do this in express terms, others by necessary implication; and probably in no one of the states has the legislature been intrusted with a power which would

¹ See *ante*, pp. 468, 469; *Corbett v. Portland*, 31 Or. 407.

² *Albany Bottling Co. v. Watson*, 103 Ga. 503. The inhabitants of a village have no inherent right to have taxes assessed and collected

by officers of their own choice, and a statute authorizing them to be laid and collected by town officers is not unconstitutional: *Jones v. Kolb*, 56 Wis. 263; *Ryerson v. Laketon*, 52 Mich. 509.

enable it to abolish the local governments.¹ It has usually a large authority in determining the extent of local powers, and the framework of local government; but while it may shape the local institutions, it cannot abolish them, and, without substituting others, take all authority to itself.

Local power to tax. Of all the customary local powers, that of taxation is most effective and most valuable. To give local government without this would be little better than a mockery. If any state has the power to withhold it, the exercise of such a power would justly be regarded as tyranny. Indeed, local taxation is so inseparable an incident to republican institutions that to abolish it would be nothing short of a revolution.

By local taxation here we do not mean that which is exercised for state purposes. So far as local officers or local boards are made use of for the levy and collection of state taxes, they cannot be left at liberty to exercise their own discretion in determining whether they will act or abstain from acting. If the state, instead of issuing a separate warrant for the collection of the state taxes, shall see fit to apportion the whole tax among the several townships, leaving the township authorities to collect their several proportions under the same warrants which are issued for the collection of local taxes, there is no reason why the collection of this proportion of the state tax should not be made compulsory. No local community has any inherent right to decide for itself whether it will or will not bear its share of the state burdens, and obviously the state could not afford to confer the right. To do so would leave the state in the same precarious condition that the federal union was found to occupy before the right to tax had been conferred upon it by the constitution: a government without the means of enforcing respect, securing obedience, performing its obligations, or perpetuating its existence.²

¹ *People v. Hurlbut*, 24 Mich. 44.

² De Tocqueville, who studied American institutions with so much care, and commented upon them with such wisdom, has the following remarks, which bear directly upon the subject now under

discussion: "In the nations by which the sovereignty of the people is recognized, every individual has an equal share of power, and participates equally in the government of the state. Why, then, does he obey the government, and what

Compulsory local taxation. But aside from cases of state taxation proper, there are some to which the same principles apply. They are cases in which taxation is usually intrusted to the judgment and discretion of the people to be taxed, but where the interest is really general, and referring the cases to

are the natural limits of this obedience? Every individual is always supposed to be as well informed, as virtuous and as strong as any of his fellow-citizens. He obeys the government, not because he is inferior to those who conduct it, or because he is less capable than any other of governing himself, but because he acknowledges the utility of an association with his fellow men, and he knows that no such association can exist without a regulating force. He is a subject in all that concerns the duties of citizens to each other; he is free and responsible to God alone for all that concerns himself. Hence arises the maxim that every one is the best and sole judge of his own private interest, and that society has no right to control a man's actions unless they are prejudicial to the common weal, or unless the common weal demands his help. This doctrine is universally admitted in the United States. I shall hereafter examine the general influence which it exercises on the ordinary actions of life. I am now speaking of the municipal bodies. The township, taken as a whole and in relation to the central government, is only an individual like any other, to whom the theory I have just described is applicable. Municipal independence in the United States is, therefore, a natural consequence of this very principle of the sovereignty of the people. All the American republics recognize it more or less; but circumstances

have peculiarly favored its growth in New England.

"In this part of the union political life had its origin in the townships, and it may almost be said that each of them originally formed an independent nation. When the kings of England afterwards asserted their supremacy they were content to assume the central power of the state. They left the townships where they were before, and, although they are now subject to the state, they were not at first, or were hardly so. They did not receive their powers from the central authority, but, on the contrary, they gave up a portion of their independence to the state. This is an important consideration, and one which the reader must constantly recollect. The townships are generally subordinate to the state only in those interests which I shall term *social*, as they are common to all the others. They are independent in all that concerns themselves alone; and amongst the inhabitants of New England I believe that not a man is to be found who would acknowledge that the state has any right to interfere in their town affairs.

"The towns of New England buy and sell, prosecute, or are indicted, augment or diminish their rates, and no administrative authority ever thinks of offering any opposition.

"There are certain social duties, however, which they are bound to fulfill. If the state is in need of

the local community is merely a politic provision for the apportionment of state burdens. Mention of one or two of these cases will sufficiently illustrate the principle.

One of the first and highest of all the duties devolving upon the state is to preserve the public peace. For this purpose, peace officers are chosen, judges selected, the militia organized, and the executive armed with very high powers to meet the contingencies of riot and disorder. In some cases, a state police force has been established as assistant to, and in some degree to supersede, the ordinary officers; but in general, the belief has prevailed that the public peace and good order were better preserved by apportioning the duty among the several municipal divisions, retaining only a state supervision over all. This apportionment is made by general laws, under which counties, towns, etc., choose their own peace officers, and levy the necessary taxes to meet the expense of a local administration of police laws; and by municipal charters which confer large police powers upon the bodies incorporated.

But if the local authorities were allowed unlimited discretion to levy or refuse to levy the necessary taxes for the support of the local police force, it might possibly happen that, from neglect or refusal to do so, one part of the state might be left a prey to disorder and violence, to the general detriment of the state at large. Of course no state could safely, for a single day, tolerate such a condition of affairs. A city or township could no more be left at liberty to decline taxation for police purposes, when the police laws and police force, and the tax which supports them, are made local by the law, than if all were general. The police organization of the state is really general, however it may vary in different localities, and the obligation to support it is general, however it may be apportioned. To this effect are the decisions.¹ And within the

money a town cannot withhold the supplies; if the state projects a road the township cannot refuse to let it cross the territory; if a police regulation is made by the state it must be enforced by the town; if a uniform system of public instruction is enacted every town is bound to establish the

schools which the law ordains:" Democracy, ch. v.

¹ *People v. Chicago Common Council*, 51 Ill. 17; *Baltimore v. State*, 15 Md. 476; *People v. Mahaney*, 13 Mich. 481; *People v. Detroit Common Council*, 28 Mich. 228, 236; *Gooch v. Exeter (N. H.)*, 48 Atl. Rep. 1101; *People v. Draper*, 15 N. Y. 532.

reason of these decisions would fall all cases in which the municipal corporations or subdivisions of the state are called upon to tax their people for the erection and repair of court-houses and jails, by means of which the police laws are rendered effectual. Such calls must, of course, be responded to.¹

The power that prescribes police regulations and varies them to meet the needs of different localities has undoubted authority to apportion the moneys raised for general purposes, on its own view of the local needs. The legislature may, therefore, require a county to appropriate a part of its revenue to the special needs of the police board of a city within its limits; and an act for that purpose is liable to no constitutional objection.²

Roads and bridges. Elsewhere in this work, the public highways have been spoken of as subjects of general concern to the people of the whole state. In a certain sense they are of local concern, because the local organizations construct and support them, but they are constructed for the general benefit and use of all the people, and only turned over to the localities as a matter of apportionment. This being the case, any township, city, or county that neglects its duty in this regard may be compelled by the interference of the state, and on state account, to perform it.³ This doctrine applies to the common highways

¹ The state cannot compel a city to erect a court-house for the county, but it may authorize the city to do so, either with or without a vote of the electors or of the taxpayers favoring it: *Callam v. Saginaw*, 50 Mich. 7. It has been held that the state has power to compel a county to tax itself for the purpose of making good to the people of one town the losses sustained in consequence of the removal of the county seat therefrom: *Wilkinson v. Cheatham*, 43 Ga. 258.

² *State v. Police Com'rs*, 34 Mo. 546.

³ That the legislature, in laying out a road through several towns,

has authority to apportion between them the expense of construction, see *Norwich v. County Com'rs*, 13 Pick. 60; *Hingham and Quincy Co. v. Norfolk County*, 6 Allen 353; *Salem Turnpike, etc. Corp. v. Essex County*, 100 Mass. 282; *Commonwealth v. Newburyport*, 103 Mass. 129; *Waterville v. Kennebeck County*, 59 Me. 80; *Shaw v. Dennis*, 5 Gilm. 405; *Mahanoy v. Comry*, 103 Pa. St. 362. It has been held that the legislature may order a reapportionment when justice requires it: *Cambridge v. Lexington*, 17 Pick. 222; *Attorney-General v. Cambridge*, 16 Gray 247.

and streets;¹ whether it can be extended to exceptional means of passage and transportation will be considered further on.

There is special need for the state possessing and sometimes exercising a compulsory authority in these cases, springing from the fact that expenditures necessary for making satisfactory thoroughfares are likely in some localities to be so great that it would not be just that the local public should bear the whole. In such cases it has been seen that it is customary to create overlying taxing districts to meet the expense;² and in the case of bridges, in particular, while the towns or even the road districts are required in general to make them, it is customary to compel the counties to assist wherever the expense is exceptionally heavy, and perhaps to take upon itself the whole cost of any considerable structure.³

¹ The legislature may compel a municipality to levy a tax for the construction of a local road: *Wilcox v. Deer Lodge Co.*, 2 Mont. 574. It may provide for the improvement of city streets and the laying of assessments therefor through commissioners of state appointment, instead of leaving the choice to the municipal authorities: *Matter of Woolsey*, 95 N. Y. 135. A constitutional provision that city officers shall be elected by the people does not preclude the legislature from clothing officers appointed by it for carrying out a public improvement with authority to perform acts which have an especial relation to and connection with such improvement; *e. g.*, a street improvement by park commissioners: *Astor v. New York*, 62 N. Y. 567. The legislature can require a city to pay for the construction of a tunnel or sub-way under the city to be leased, when completed, to a street-railway company. Being a public work for a public use the statute is not an unwarranted exercise of the power of taxation:

Browne v. Turner, 174 Mass. 150, 176 Mass. 8. In Louisiana, under the constitutional provision reserving to the general assembly plenary power to deal at will with the corporation of the city of New Orleans, the authorization of a street improvement in that city is within the legislative discretion, and a vote of the property taxpayers is unnecessary: *Barber Asphalt Paving Co. v. Gogreve*, 41 La. An. 251. In Illinois a municipality will not be compelled to raise money by general taxation to pay for lands taken for a street where it elected to pay for them by special assessments: *People v. Hyde Park*, 117 Ill. 462.

² *Ante*, p. 240.

³ See *Will County Supervisors v. People*, 110 Ill. 511. Also *Springfield v. Power*, 25 Ill. 187; *Logan County v. Lincoln*, 81 Ill. 156; and *Halsey v. People*, 84 Ill. 89, for the general power of the legislature to apportion county revenues between a city within the county and the other municipalities.

Schools. Wherever a system of public instruction is established by law, to be administered by local boards, who levy taxes, build school-houses, and employ teachers for the purpose, it can hardly be questioned that the state, in establishing the system, reserves to itself the means of giving it complete effect and full efficiency in every township and district of the state, even though a majority of the people of such township or district, deficient in proper appreciation of its advantages, should refuse to take upon themselves the expense necessary to give them a participation in its benefits. Possibly judicial proceedings might be available in some such cases, where a state law for the levy of local taxes for educational purposes had been disobeyed; but the legislature would be at liberty to choose its own method for compelling the performance of the local duty.¹ And here again the state has the same power to apportion the moneys raised for the general purpose that it has to apportion moneys raised for police purposes or for roads.²

¹ In *Revell v. Annapolis*, 81 Md. 1, an act directing city authorities to issue bonds to raise money for a public school building in the city was sustained against the objection that the levy of taxes to pay the bonds would constitute a taking of property without due process of law. In *Board of Education v. Kingfisher*, 5 Okl. 82, it was held that a statute which provided that a levy made by the city board of education should be approved by the city council was mandatory, and gave the council no discretion to reduce the tax. In *State v. New Orleans*, 42 La. An. 92, the legislative requirement that the city council of New Orleans should appropriate a certain sum to meet the expenses of the public schools was held void under a constitutional provision that "the legislature shall provide that every parish may levy a tax for the public school therein," which negated the power to

compel a city representing a parish to levy such a tax, or to make an appropriation in lieu thereof. It is noticeable that in those states in which a general system of public instruction has longest prevailed, the municipalities have not been disposed to find fault because they were required to maintain schools; but the complaint, when there has been any, has come from single individuals, who have complained that the local powers of taxation were exercised with unreasonable liberality for this purpose. The cases of *Cushing v. Newburyport*, 10 Met. 508; *Stuart v. Kalamazoo*, 30 Mich. 69, and *Horton v. School Commissioners*, 43 Ala. 598, may be referred to. The contest has been made on other grounds in other states. See *Kinney v. Zimpleman*, 36 Tex. 554; *Commissioners of Schools v. Allegany County*, 20 Md. 439.

² A law for the distribution of

Public health. The subject of the public health is another in respect to which the legislature may exercise for the general good the power of local taxation. The state may have its state board of health, but it will provide for local boards of health also, and as their duties concern the community at large, their members are to be regarded as state rather than local officials.¹ They are usually given large powers of police to prevent the spread of contagious and infectious diseases, with incidental authority to levy taxes or collect fees in the nature of taxes to enable them to make the exercise of power effectual.² How far they shall be subordinated in their functions to the municipal authorities, the legislature has full liberty to determine. But the state may more directly, without the intervention of such boards, levy taxes or special assessments, either in a municipal subdivision of the state, or in a special district created for the purpose, when the public health appears to require it; and this power is frequently exercised for the construction of drains and levees, as is shown in the preceding chapter.³

Contract obligations. Those cases in which the state interferes to compel a political corporation or body, which exists

school taxes may be changed after the tax is levied, and the last law will control: *School District v. Webber*, 75 Mo. 558. A city which has collected privilege taxes is subject to the control of the state as to their disposition, and the state may transfer them from the general fund to the school fund: *State Board of Education v. Aberdeen*, 56 Miss. 518. On the general subject of state control of local revenues, see *Mount Pleasant v. Beckwith*, 100 U. S. 514; *Meriwether v. Garrett*, 102 U. S. 472; *Logan County v. Lincoln*, 81 Ill. 156.

¹ *Davock v. Moore*, 105 Mich. 120; *Taylor v. Board of Health*, 31 Pa. St. 73. The former case holds that a statute creating a board of health for the city of Detroit is not unconstitutional as

authorizing the board of health to require money to be raised by a tax for local purposes without the consent of any of the local officers or boards of the city, as the preservation of the public health is not a local purpose.

² *People v. Macomb Supervisors*, 3 Mich. 475; *Taylor v. Board of Health*, 31 Pa. St. 73.

³ See *Hagar v. Reclamation District*, 111 U. S. 701. The power of the legislature to assess upon certain towns and cities the expense of constructing a sewerage system is not affected by their want of ownership in the property of the sewers and works, and their right to use the same only under the rules prescribed by statute: *Kingman, Petitioner*, 153 Mass. 566.

and exercises authority by its permission, to meet its contract obligations and pay its just debts, may be defended on two grounds: *First*, that it is the right and the duty of the state to see that the powers it confers are not abused, to the injury of those who have relied upon them. *Second*, that when a political corporation has contracted a debt or incurred an obligation, it has already taken the initiatory step in taxation, and has, in effect, given its consent that the subsequent steps, so far as they may be essential to the discharge of such debt or obligation, may be taken. No matter, therefore, what the purpose of any lawful municipal contract, the taxation to perform it must be regarded as taxation by consent of the people who made it. And while the general law usually makes provision for such cases, by means of suits at law and perhaps executions, circumstances sometimes render it entirely proper that more speedy remedies be provided, and of these the most speedy and effectual might possibly be a special tax upon the delinquent municipality, ordered by the state, and perhaps levied through state agencies.¹ Nor would the power of the state in this regard

¹ A charter provision directing the general council of a city to levy by ordinance an annual tax to pay the principal and interest of certain bonds, and providing that if in any year the council should fail to pass such an ordinance, or if the ordinance passed should be invalid or inoperative, the rate of taxation should be a certain percentage, sustained: *Louisville v. Murphy*, 86 Ky. 53. For a case of the levy of a tax by the state upon the municipality to provide for municipal obligations, see *Dunnovan v. Green*, 57 Ill. 63. Also *Decker v. Hughes*, 68 Ill. 33. Where a statute compels payment by a municipality without its consent or that of its taxpayers, the purposes for which taxation may be authorized are much more restricted than where such consent is first obtained: *Lund v. Chippewa County*, 93 Wis. 640; *Wiscon-*

sin Keeley Inst. Co. v. Milwaukee County, 95 Wis. 153. It is no defense to a tax to provide for a city debt that when the debt was contracted the property taxed was not included in the city: *New Orleans v. Burthe's Estate*, 26 La. An. 497. A statute validating city indebtedness where the ground of invalidity was that it exceeded the amount authorized by the charter, was held not to conflict with constitutional provisions that cities might be vested with authority to assess and collect taxes for all corporate purposes, and that the legislature should have no power to impose taxes upon cities for municipal purposes, but might, by general laws, vest in the corporate authorities thereof power to assess and collect taxes for such purposes: *Baker v. Seattle*, 2 Wash. 576. By statute the moneys collected in certain towns

be confined to obligations of a strictly legal nature; for the difference between a legal and moral obligation is frequently no more than this: that the one has a remedy provided for its enforcement, and the other has not. No question, for example, can fairly be raised of the right of the state, after it has formed two municipal governments where one existed before, and apportioned the debts and property of the old organization between the two new ones, to require and compel the payment of any balance found equitably due.¹ Another case is where the state requires one of its corporations to reimburse to the officers expenses they have incurred in an honest though mistaken effort to perform their official duty,² or the money lost or stolen from them without their own fault.³

Mobs and riots. Another similar case is where a municipal corporation is compelled, by means of taxation, to make compensation for losses sustained within its limits at the hands of mobs and rioters. It has been thought from very early times

as county taxes were required to be appropriated to the payment of the railroad-aid bonds of such towns. Held, that the moneys belonged to the towns for this purpose, and they might sue the county to recover them: *Bridges v. Sullivan Supervisors*, 92 N. Y. 570. Where a tax is laid for the benefit of a locality, and there is no complaint by or on behalf of the municipality or its authorities that it is not consulted, the persons taxed cannot object: *Youngblood v. Sexton*, 32 Mich. 406.

¹ *People v. Alameda*, 26 Cal. 641; *People v. Power*, 25 Ill. 187; *Layton v. New Orleans*, 12 La. An. 515; *Harrison v. Bridgeton*, 16 Mass. 16. See *Vose v. Frankfort*, 64 Me. 229. The reduction of the limits of a municipal corporation, after a tax is levied, will not defeat the tax in the part cut off, where a general statute provides that it shall not affect rights ac-

rued: *Sherman v. Benford*, 10 R. I. 559.

² See the extreme case of *Guilford v. Chenango Supervisors*, 13 N. Y. 143, 18 Barb. 615, questioned in *People v. Toppan*, 29 Wis. 664, 687. In *Sinton v. Ashbury*, 41 Cal. 525, 530, *Crockett, J.*, asserts in strong terms the power of the legislature to compel a municipal corporation "to pay a demand, when properly established, which in good conscience it ought to pay, even though there be no legal liability to pay it." And see *New Orleans v. Clark*, 95 U. S. 644.

³ *Board of Education v. McLandsborough*, 36 Ohio St. 227. This would seem to follow the doctrine laid down in the cases cited in the last note. It would not be admissible under the constitution of Michigan: *People v. Onondaga Supervisors*, 16 Mich. 254; *Bristol v. Johnson*, 34 Mich. 123.

that that political division of the county which failed to exert its authority for the effectual suppression of disorder, by means whereof innocent parties suffered from lawlessness and violence within its boundaries, might justly be required to make good the losses, and that its diligence in maintaining the empire of the laws would be quickened by the requirement.¹ Such legislation is, in effect, only a part of the state police system, under which the municipal divisions are severally looked to for the preservation of the public peace within their respective limits.² And speaking generally, it may be affirmed that in any case in which compulsory taxation is found necessary, in order to compel a municipal corporation or political division of the state to perform properly and justly any of its duties as an agency in state government, or to fulfill any obligation legally or equitably resting upon it in consequence of any corporate action, the state has ample power to direct and levy such compulsory taxation, and the people to be taxed have no absolute right to a voice in determining whether it shall be levied, except as they may be heard through their representatives in the legislature of the state.³

¹ *Darlington v. New York*, 31 N. Y. 164. This case was decided under a law passed before the mischief was done; but no reason is perceived why the equity of such a claim might not be recognized by legislation adopted afterwards. It is within the police power of the state to make a city or county liable for property destroyed within it by a mob, without reference to its ability or exercise of diligence to prevent the destruction: *Chicago v. Manhattan Cement Co.*, 178 Ill. 372. Under the provision of the Ohio constitution, that the commissioners of counties, the trustees of townships, and other similar boards shall have such power of local taxation, for police purposes, as may be prescribed by law; under the general police power; and under the general taxing power, the legislature

has power to enact "for the suppression of such violence" a statute inflicting upon the county in which a person is injured or killed by a mob, a penalty to be paid to such person or his next of kin, and to authorize and require a tax-levy therefor: *Board of Com'rs v. Church*, 62 Ohio St. 318.

² See *In re Pennsylvania Hall*, 5 Pa. St. 204; *People v. Chicago*, 51 Ill. 17; *Wider v. East St. Louis*, 55 Ill. 133, 137; *Favia v. New Orleans*, 20 La. An. 410.

³ *Chicago v. Manhattan Cement Co.*, 178 Ill. 372. It is competent, by special statute, to compel one county to levy a tax in order to refund to another county the fair proportion of the expenses which have been incurred by the latter in trials concerning the distribution of the proceeds of sales of property lying in both: *Lycoming*

Doubtful cases. Where a county is divided, and property and debts are to be apportioned, political considerations are involved, and the legislature must directly or indirectly pass upon them.¹ But when demands are asserted against municipal corporations, growing out of contracts, or upon such grounds as might give rights of action against individuals, it is at least questionable whether the legislature may pass upon the facts, adjudge the corporation liable, and proceed to enforce payment by taxation. Such action, as against a natural person, would be clearly judicial, and therefore beyond the legislative competency; and it could only be sustained in the case of municipal corporations on the doctrine that their powers and rights are wholly at the legislative disposal; a doctrine dangerous in government, and, as we think, unsound in constitutional law. The opinion has sometimes been expressed that these corporations were entitled to the constitutional benefits of an ordinary trial.² But this is denied in other cases, and perhaps a hearing before some court or board of audit might be all the corporation could demand.³ But such a hearing, if local municipal government is a matter of substance, they must be entitled to. It is not believed that the liability of the corporation must be made to turn on legal questions purely. On the contrary, it is more consistent with the dignity and honor of government that all demands against the public shall be settled on broad grounds of equity, instead of being tested by technical rules; and auditing boards are generally, with the utmost propriety, empowered to govern their action by equitable considerations. This only is maintained: that the legislature is not a proper

v. Union, 15 Pa. St. 166. If a city exercises to the utmost its power of taxation, and the amount raised is not more than enough to pay necessary current expenses, no part of this can be applied on city bonds: Tucker v. Raleigh, 75 N. C. 267.

¹ See *ante*, p. 251.

² See Gage v. Graham, 57 Ill. 144; Sanborn v. Rice County, 9 Minn. 273; People v. Haws, 37 Barb. 440; Plimpton v. Somerset,

33 Vt. 283; State v. Tappan, 29 Wis. 664.

³ Layton v. New Orleans, 12 La. An. 515; In re Pennsylvania Hall, 5 Pa. St. 204; Borough of Dunmor's Appeal, 52 Pa. St. 374. Compare Commonwealth v. Pittsburgh, 34 Pa. St. 496. In Vasser v. George, 47 Miss. 713, 720, *Simrall*, J., claims very broad authority for the legislature in adjusting claims against municipalities.

auditing board as between the municipalities and third persons, though it may undoubtedly prescribe the rule of liability for all cases.

Nature of municipal corporations. Before considering some other cases it may be well to refer briefly to the general nature of municipal corporations. Primarily these are public and their powers governmental. They are created for convenience, expediency, and economy in government, and, in their public capacity, are and must be at all times subject to the control of the state which has imparted to them life, and may at any time deprive them of it.¹ But they have or may have another side, in respect to which the control is in reason, at least, not so extensive. They may be endowed with peculiar powers and capacities for the benefit and convenience of their own citizens, and in the exercise of which they seem not to differ in any substantial degree from the private corporations which the state charters. They have thus their public or political character, in which they exercise a part of the sovereign power of the state for governmental purposes, and they have their private character, in which, for the benefit or convenience of their own citizens, they exercise powers not of a governmental nature, and in which the state at large has only an incidental concern,² as it may have with the action of private corporations. It may not be possible to draw the exact line between the two, but provisions for local conveniences for the citizens, like water, light, public grounds for recreation, and the like, are manifestly matters which are not provided for by municipal corporations in their political or governmental capacity, but in that *quasi* private capacity in which they act for the benefit of their corporators exclusively.³ In their public, political capacity, they

¹ Meriwether v. Garrett, 102 U. S. 472.

² Crane v. Siloam Springs, 67 Ark. 30.

³ This two-fold nature of municipal corporations has often been commented upon and been made the ground of important decisions. See Touchard v. Touchard, 5 Cal. 306; Holland v. San Francisco, 7

Cal. 361; San Francisco Gas Co. v. San Francisco, 9 Cal. 453; Jones v. West Haven, 34 Conn. 1, 12; Hewison v. New Haven, 37 Conn. 475, 483; Revell v. Annapolis, 81 Md. 1; People v. Corey, 9 Mich. 165; People v. Hurlbut, 24 Mich. 44; People v. Detroit Common Council, 28 Mich. 228, 238; Cook Farm Co. v. Detroit, 124 Mich. 426;

have no discretion but to act as the state which has created them shall, within constitutional limits, command, and the good government of the state requires that the power should at all times be ample to compel obedience, and that it should be capable of being promptly and efficiently exercised. In the capacity in which they act for the benefit of their corporators merely, there would seem to be no sufficient reason for a power in the state to make them move and act at its will, any more than in the case of any private corporation. With ample authority in the state to mould, measure, and limit their powers at discretion, and to prevent any abuse thereof, their action within the prescribed limits, in matters of importance to themselves only, it would naturally be supposed, should be left to the judgment of their citizens and of their chosen officers.

And this has been the view on which the several state legislatures have in general acted. The largest liberty of action has been permitted to municipal bodies in matters of local concern, and very seldom has the disposition been evinced to interfere any further than was deemed necessary to prevent an oppressive exercise of local powers, and to confine them to proper local purposes. And in those cases in which municipal corporations have been allowed to vote taxes for purposes not strictly local, but on the grounds of special local benefit, the legislation has seldom gone beyond giving permission to vote them if the electors of the locality should choose to do so. Whenever the legislation has gone further than this, the courts have generally held that the legislative power of control has been exceeded. In a leading case in Vermont, the legislature provided for the appointment, by a county commissioner, of a town agent, who should be empowered to purchase liquors on the credit of the town, and sell the same for such purposes as were admissible under what was known as the prohibitory liquor law, accounting to the town for the proceeds. The act was held invalid; the court declaring that "courts that have

Bailey v. New York, 3 Hill 531;
Lloyd v. New York, 5 N. Y. 369,
375; Storrs v. Utica, 17 N. Y. 104;
People v. Batchellor, 53 N. Y. 128;
Milhau v. Sharp, 15 Barb. 193;
Western Reserve Coll. v. Cleve-

land, 12 Ohio St. 375; Western
Savings Fund Soc. v. Philadelphia,
31 Pa. St. 175; Atkins v. Randolph,
31 Vt. 226; Hasbrouck v. Milwau-
kee, 13 Wis. 37.

gone farthest in sustaining laws of state legislatures, against the restrictive provisions of state constitutions, repudiate entirely the idea that a person, whether natural or artificial, can be compelled by legislative enactment to become a party to, or to be subjected to liability upon, a contract."¹ A like doctrine has been strongly asserted in Massachusetts, where in a case in which the legislature had taken steps looking to the establishment of a pecuniary demand against a municipal corporation, without its consent, the court declared — having the municipal corporation in view as the party to be charged — that "it is not in the power of the legislature to create a debt from one person to another, without the consent, express or implied, of the person to be charged," and that if the attempt were made, "it would not be within the power of any judicial court to enforce such an act."² A similar ruling was made in Maine in a similar case.³ In Wisconsin, the power of the legislature to force taxation upon the people for objects not within the customary grant of local powers for governmental purposes has been pointedly denied in cases in which the objects contemplated were presumptively of great local importance and value; one case, being that of an improvement of the city harbor,⁴

¹ *Atkins v. Randolph*, 31 Vt. 226, 236, per *Barrett, J.* In this case Chief Justice *Black* is quoted, who, in that opinion of his in *Sharpless v. Philadelphia*, 21 Pa. St. 147, 165, which asserts legislative supremacy in matters of taxation in very strong, if not extravagant, language, nevertheless interposes this caution: "I do not say, however, that a contract between two individuals, or two corporations, can be made by the legislature. That would not be legislation. Besides, it would be impossible, in the nature of things; for the essence of a contract is the agreement of the parties."

² *Hampshire v. Franklin*, 16 Mass. 76, 84, per *Parker, Ch. J.* And see *Richland v. Lawrence*, 12 Ill. 1, 8.

³ *Brunswick v. Litchfield*, 2 Greenl. 28, 32; *Bowdoinham v. Richmond*, 6 Greenl. 112.

⁴ *Hasbrouck v. Milwaukee*, 13 Wis. 37. In this case, *Dixon, Ch. J.*, speaking of the power of the legislature to make a contract for a municipal corporation against its will, says: "It is certainly unnecessary at this day to enter into an argument or to cite authorities to show that, under a constitutional government like ours, the legislature has no such power." This decision is defended in an able opinion by the same learned judge, in *Mills v. Charlton*, 29 Wis. 400. See, also, *Knapp v. Grant*, 27 Wis. 147; *State v. Tappan*, 29 Wis. 664.

and another that of a state normal school, to be located in the city, whose money, collected for local school purposes, the state directed should be appropriated to its erection.¹ In Iowa it is held that the legislature has not power to vest the levying of a tax for purposes purely local in a body not directly responsible to the voters of the city.² In Michigan, the authority of the state to appoint agents who, without the consent of a city, might issue obligations binding upon it for the purchase and embellishment of a public park for its citizens, was denied on like grounds;³ and in very recent cases the power of the legis-

¹ *State v. Haben*, 22 Wis. 660, per *Dixon*, Ch. J. "Was it competent," it was inquired in this case, "for the legislature, without the assent of the city or its inhabitants, thus to divert the funds raised and in the hands of the treasurer for the purpose of erecting a suitable high school building, and to declare that they should be appropriated, not for that purpose, but for the purpose of purchasing a site for a state normal school in the city? We are clearly of the opinion that it was not. It is well settled as to all matters pertaining to vested rights of property, whether real or personal, and to the obligation of contracts, that municipal corporations are as much within the protection of the federal constitution as private individuals are. The legislature cannot divest a municipal corporation of its property without the consent of its inhabitants, nor impair the obligation of a contract entered into with or in behalf of such corporation."

² *State v. Des Moines*, 103 Iowa 76.

³ *People v. Detroit Common Council*, 28 Mich. 228. And see *People v. Hurlbut*, 24 Mich. 44. In this last case, in answer to an

objection that there was no express saving of municipal rights in the state constitution, the following remarks are made (p. 107): "Some things are too plain to be written. If this charter of state government which we call a constitution were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so; if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hun-

lature to compel taxation in a city for purely local purposes, such as the furnishing of light and water to the citizens, has been negatived.¹ In Kansas, where county officers had issued to a creditor of the county the county bonds, bearing a rate of interest higher than was permitted by the law under which the debt was contracted, it was decided that the legislature had no power to validate the bonds; this being in effect the making of a new contract to which the county had not assented.² In Illinois, similar decisions have been based upon a narrower ground. The constitution of the state provides that "the corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes;" and this, it is held, by implication precludes the levy of local taxes, or the contracting of local debts, by agencies created by the legislature, and not being the corporate authorities of the locality to be taxed, or to be bound by the debts.³ While, as has been said, the ground

dred years, many of which, in their expression, have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give; this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone."

¹ *Blades v. Detroit Water Com'rs*, 122 Mich. 366; *Cook Farm Co. v. Detroit*, 124 Mich. 426. As a corollary to the proposition stated in the text, it is held that the legislature has no power to confer on a previously appointed water board authority which it did not previously have to impose burdens of construction for water purposes: *Cook Farm Co. v. Detroit*, 124 Mich. 426.

² *Shawnee County v. Carter*, 2 Kan. 115.

³ *People v. Chicago*, 51 Ill. 17; *People v. Salomon*, 51 Ill. 37; *Har-*

ward v. Drainage Co., 51 Ill. 130; *Lovington v. Wider*, 53 Ill. 302; *People v. Canty*, 55 Ill. 33; *Wider v. East St. Louis*, 55 Ill. 133; *Sleight v. People*, 74 Ill. 47; *Hinze v. People*, 92 Ill. 406; *Cornell v. People*, 107 Ill. 372. Under the constitution of 1870 the legislature cannot impose a burden by local taxation for levees upon any locality without the consent of the citizens affected, and a law is invalid which provides that upon petition the county court shall determine the liability of a levee to be paid for by the proceeds of assessment of the property benefited. The fact that a land-owner may contest the matter in court is immaterial, since it is the decision of the court and not the land-owner's choice that controls: *Updike v. Wright*, 81 Ill. 49. By corporate authorities in the constitution is meant "those municipal officers who are either directly chosen by the people to be taxed

chosen in those cases is narrow, the decisions are nevertheless of very general application, for the terms in which authority over the municipal corporations is conferred by other constitutions, though not the same, will generally be found open to similar implications. Similar decisions have been made in Tennessee and in other states.¹

or appointed in some other mode to which they have given their assent:" *People v. McAdams*, 82 Ill. 356; *Cornell v. People*, 107 Ill. 372; *Wetherell v. Divine*, 116 Ill. 631; *Snell v. Chicago*, 133 Ill. 413. Trustees of a school district not organized under the general laws are not such officers: *People v. McAdams*, 82 Ill. 356. Where the people of a town lying within the corporate limits of a city adopt the township organization they constitute the county board "corporate authorities" for the town: *People v. Knopf*, 171 Ill. 191. Several towns may for a common purpose be united into a single district and commissioners of the district may be invested with taxing powers for district purposes. To this extent they are corporate authorities: *People v. Salomon*, 51 Ill. 37; *Park Com'rs v. Telegraph Co.*, 103 Ill. 33. And see *ante*, pp. 237-248, 1137, 1138. A statute providing that in certain towns moneys to be raised for town expenses shall be ascertained by the county board does not empower one municipality to levy taxes for corporate purposes upon another municipality without the consent of the latter, where the people of the county, including the towns, have by a majority vote adopted township organization and thereby consented to be taxed in the manner provided by law: *People v. Knopf*, 171 Ill. 191. The constitutional provision quoted above is

not violated by a statute creating a local improvement board to determine preliminary questions, and not vested with power to make the improvement or levy the tax to pay therefor: *Givins v. Chicago*, 188 Ill. 348. A ministerial officer may be empowered by law to impose a tax of a limited amount for current municipal expenses when the proper authorities: *Davis v. Brace*, 82 Ill. 542.

¹ *Pope v. Phifer*, 3 Heisk. 682, in which an able opinion was delivered by *Freeman, J.*, involving the validity of an act of the legislature appointing a state board for the levy of county taxes in a few counties named. The court held the act invalid, as being inconsistent with the right of local taxation which by implication was considered retained and intended to be perpetuated by the constitution. And after commenting upon the maxim that taxation and representation go together, the court query concerning the board in question: "Can it be believed for a moment that the power was ever intended to be delegated by the people to the legislature to authorize such a body, so appointed and constituted, to perform the functions assigned to them in this act? We think no reasonable man can come to such a conclusion." In California it is held that the legislature cannot, under the constitution, exercise directly the power of assessment

In one or two states an inclination has been manifested to accept, in its broadest signification, the language in which an

for a local improvement in an incorporated city, regardless of the will of the local community: *People v. Lynch*, 51 Cal. 15; *Schumacker v. Toberman*, 56 Cal. 508. And in that state the legislature cannot impose a tax upon the property or the inhabitants of a school district, nor can it prescribe a procedure through which such tax would inevitably be levied, without leaving any discretion in regard to it to the local authorities: *McCabe v. Carpenter*, 102 Cal. 469. See, also, *People v. Hastings*, 29 Cal. 449; *San Francisco v. Liverpool, etc. Ins. Co.*, 74 Cal. 113; *State v. Leffingwell*, 54 Mo. 458. In Kentucky the constitution provides that the general assembly shall not impose taxes for the purpose of any municipal corporation; and this is not violated by a statute providing for a local tax on corporate franchises, since it is left to the local authorities to levy such tax as they may deem necessary: *South Covington & C. St. R. Co. v. Bellevue (Ky.)*, 49 S. W. Rep. 23; *Paducah St. R. Co. v. McCracken County (Ky.)*, 49 S. W. Rep. 178. The Colorado constitution prohibits the legislature from imposing taxes for any other than state purposes: In re House Bill No. 270, 9 Colo. 635. The provision of the Nebraska constitution that the legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes, is infringed by a statute requiring insurance companies to pay a certain amount of their gross receipts for the support of the fire departments of cities: *State v. Wheeler*, 33 Neb.

563. A constitutional provision against the imposition of municipal taxation except by general laws vesting the municipal authorities with the taxing power, is not violated by a statute providing for the improvement of county roads, and apportioning the cost to the county and the several towns, cities, and road districts comprising it: *Senor v. Board of Com'rs*, 13 Wash. 48. A constitutional provision vesting the taxing power in the general assembly for state purposes, and in municipal corporations, under the authority of the general assembly, for municipal purposes, and prohibiting the general assembly from imposing taxes on municipal corporations, or on the property or inhabitants thereof for municipal purposes, is contravened by a statute imposing a uniform license tax on merchants, etc., to be fixed by a board of commissioners, and requiring two-thirds of such tax to be paid into the city treasury, and one-third into the state treasury as a condition to the issuing of a license to do business: *State v. Ashbrook*, 154 Mo. 375. Under the constitution of Louisiana the taxing power of the state, that of the parish, and that of a municipal corporation are to be kept separate: *State v. Police Jury*, 47 La. An. 1244. It has been held in Washington that the legislature can require a municipality to guaranty the payment of the amount paid for a delinquent tax-certificate in case it is found to be void, and to pay interest upon the amount of such guaranty: *State v. Whittlesey*, 17 Wash. 447.

unrestricted authority in the legislature over the whole subject of taxation is usually spoken of when there is no occasion for pointing out the limitations. It has already been shown by the citation of a large number of cases that no such unrestricted power exists, and it may safely be asserted that it ought not to exist. It is not difficult to give the most reckless robbery for private purposes the forms of constitutional action, and it is as easy to call it a tax as it was in former periods to call those exactions which were enforced by prisons and physical suffering and the quartering of a ruthless soldiery upon the people by the gentle name of benevolences. Taxation is a fearful power, but, like other legislative powers in representative government, it has its checks and balances. It is certainly limited as to purposes, and, as has been generally believed, by local rights immemorially existing and universally recognized.

A recent case in Alabama is of importance as bearing upon this question just mentioned. An act of the legislature of that state constituted a board, consisting of the president of the court of county commissioners of revenue of Mobile county, the mayor of Mobile, the president of the bank of Mobile, the president of the Mobile chamber of commerce, and one citizen of the county of Mobile to be appointed by the governor, who, and their successors, were to be commissioners for the purpose of improving the river, harbor, and bay of Mobile. The county commissioners of revenue were directed to issue to said board bonds to the amount of one million dollars, binding upon the county, to be made payable as they should determine, and "to levy such tax as may be deemed proper to pay such bonds." The constitution provided that "No power to levy taxes shall be delegated to individuals or private corporations;" but the act was nevertheless sustained in an opinion that does little more than to allude to the very important question arising under the state constitution, and avoids the discussion of general principles.¹

¹ President and Commissioners, etc. v. State, 45 Ala. 399. The case in which the question arose was a proceeding in *mandamus* against the county commissioners of revenue to compel them to issue bonds

under the act to the harbor improvement board. In answer to the objection that here was a case of delegation of the power to tax, which by the constitution was forbidden, *Safford, J.*, delivering the

A case which was more considered was decided a few years since in New York. An act of the legislature had named commissioners, authorized them to lay out and construct roads in two townships named, at a cost per mile not exceeding twenty thousand dollars, exclusive of bridges. The sum necessary to be raised to meet the expense was to be obtained by a sale of town bonds, to be issued by the town officers on the requisition of the commissioners, and by the latter sold. The roads, it will be seen, were local roads, to be constructed by state agents at the cost of the towns; neither the people of the town nor the local officers being consulted or allowed any authority whatever in the premises, or even the privilege of being heard. The work was exceptionally if not extravagantly expensive, and it is difficult to conceive of any justifiable ground for forcing upon an unwilling people an expense of this description, when no corresponding burdens were imposed on other localities. The court of appeals, however, felt constrained to uphold this legislation, basing the decision upon the ground of a general power in the legislature over the subject of taxation, which in this particular was not restricted by any express provision of the state constitution.¹

Conceding this to be sound doctrine, it must nevertheless be called hard doctrine. Such legislation stands wholly apart and distinct from all the ordinary provisions for the construction and support of highways. The customary regulations are made on some rule of apportionment, and this case had no rule but the special legislative determination.² And it may well

opinion of the court, says: "even if it be a delegation of the taxing power to individuals or private corporations, that portion of the act only need be vitiated." We should understand from this that the court did not regard the conferring upon this board the power of making the improvement, and of demanding and making use of bonds binding upon the county, for the purpose, as being equivalent to a delegation of the power to tax.

¹ *People v. Flagg*, 46 N. Y. 401.

This case was followed in *Jensen v. Supervisors*, 47 Wis. 298. The act there under consideration was for the laying out of a state road, and was in no manner exceptional.

² In *Goodrich v. Turnpike Co.*, 26 Ind. 119, an act "to allow county commissioners to organize turnpike companies," which permitted the cost of constructing the turnpike to be assessed upon the real estate within three-fourths of a mile of the proposed road, was sustained. This was an exceptional method, but not unknown

have been regarded by the people concerned as specially objectionable, because depriving them of one of the privileges intended to be secured to them by the state constitution. That instrument had provided that local officers should be chosen by the voters of the locality,¹ and it doubtless intended that they should be left to exercise the usual local powers. While this appointment of commissioners for roads in the two towns avoided a violation of the words of the constitution, the violation of its spirit, unless the roads were in importance something more than ordinary town highways, would seem to be undoubted. It is a well known principle, however, that a legislative violation of the spirit of the constitution does not ordinarily permit of judicial correction.

A case in Pennsylvania in which the legislature provided for the construction of an exceptionally expensive road at the cost of the people living on and near the same, without their consent, and not, as the court found, for the local but for the general benefit, must be regarded as opposed to the one in New York. The court held that, on the general principles governing taxation, the legislature had no such power.² And this decision finds, as we think, strong support in a recent decision of the court of appeals of Kentucky, a court whose decisions in matters of taxation are always able and strong. The case there was one of a city assessment. It was denied that the legislature possessed the power to require a certain portion of one street in a city to be improved in a manner exceptionally expensive, at the cost of abutting owners and without their consent, when by the law as to all the other streets the owners of the larger proportion of the frontage must petition for such an improvement before it could be ordered.³ The case was one of an invidious assessment, as were those in Pennsylvania and New York. "A law," it is said by the court, "imposing taxation on the general public, the evident intent and legitimate results of which are to equalize the burden so far as practi-

to the law, and it was neither oppressive nor was the whole matter taken out of the hands of the local authorities.

¹ Const. of N. Y., art. X, § 2.

² Matter of Washington Avenue,

69 Pa. St. 352. See *Craig v. Philadelphia*, 89 Pa. St. 265; *Philadelphia v. Rule*, 93 Pa. St. 15; *Seely v. Pittsburgh*, 82 Pa. St. 360.

³ *Howell v. Bristol*, 8 Bush 493, per *Lindsay, J.*

cable, will not be held as violative of the fundamental law merely because that desirable end may not be attained. But when, as in this case, the most probable, if not the necessary, consequence of the law is to produce the most oppressive inequality, and to compel a small minority of taxpayers to provide, at their sole expense, an improvement of general utility and public interest, the construction of which costs more than double as much as the character of such improvements in general use, and from which, when constructed, the general public derives almost as much advantage as themselves, it assumes the character of an attempted exercise of arbitrary power over the property of this minority; it becomes, in a constitutional sense, a taking and appropriation of their private property to the public use without compensation, and it cannot be sustained so long as the safeguards placed around the citizen by our fundamental law are respected and upheld. No such power over the property of the citizen can be constitutionally exercised by any department of our state government; and whenever it is attempted, it is the imperative duty of the judiciary to interpose in behalf of those whose constitutional rights are being thereby prejudicially affected." Whatever may be thought of the relative soundness of these decisions in matters of law, those which deny the power to levy such invidious burdens are most likely to conduce to equality and fairness in matters of local taxation and to just purposes and purity in legislation. It is difficult to conceive of a more corrupting power than that of voting taxes by those who are not to feel them, especially when the expenditure may be confided to those who have no interest personally or as corporators, and who will presumably be concerned only to the extent that they can make a personal profit of the taxes which others are to pay.

In another recent case in New York, it is decided that the legislature may require a village to levy a special tax to be expended in the construction of a state educational institution at that locality.¹ This decision is based upon the sovereign power of the state to tax and apportion the public burdens, a power which, unless it is subject to implied limitations, would

¹ *Gordon v. Cornes*, 47 N. Y. 608.

enable the legislature of a state to require its capital town to construct the state house, another town to construct the state prison, and so on, to the entire relief of the state at large. It has been seen that a decision in Wisconsin is opposed to the one just cited, and that derives strong support in more recent cases in Illinois¹ and Michigan.²

The New York cases which have been mentioned find abundant justification in an earlier case in the same state, and could not well have been decided otherwise without rejecting that as an authority. The facts in that case were the following:

Certain citizens of Utica, in order to secure the connection of the Chenango canal with the Erie at their place, entered into a bond conditioned to pay the state some \$38,000, the estimated increased expense in bringing the canal to that point, instead of to another which had been proposed. Having thereby secured the location, the legislature then interfered for their relief, and required the amount of the obligation to be assessed as a tax upon the real estate of the city of Utica. Was this a constitutional tax? The supreme court of the state held that it was. "The general purpose of raising the money by tax was to construct a canal, a public highway, which the legislature believed would be a benefit to the city of Utica as such, and, independently of the bond, the case is the ordinary one of local taxation to make or improve a highway."³

¹ *Livingston County v. Weider*, 64 Ill. 427, is specially referred to. This case is commented on and explained in *Burr v. Carbondale*, 76 Ill. 455, in which it was held competent to *permit* a locality to vote special aid to a state building. See, also, *Hensley v. People*, 84 Ill. 544; *Livingston Co. v. Darlington*, 101 U. S. 407.

² *Callam v. Saginaw*, 50 Mich. 7.

³ *Thomas v. Leland*, 24 Wend. 65, 67, per *Cowen*, J. Under the principles of this decision it might, perhaps, be held that the legislature had the power to require the refunding by the munici-

palities of commutation moneys, or moneys paid to secure substitutes, where the effect was to relieve the municipality from a draft. The purpose of the payment, so far as it went to aid the government by money or men, was public; and yet as such payments are made by parties for their own advantage, a law levying taxation to refund them is judicially declared to resemble "an imperial rescript," rather than constitutional taxation. *Thompson, J.*, in *Tyson v. School Directors*, 51 Pa. St. 9, 22. In *Perkins v. Milford*, 59 Me. 315, 318, *Appleton, Ch. J.*, in

How far the principle of this case can be carried beyond the exact state of facts upon which it was decided is a question of the highest interest. Would it, for instance, have been within the power of the legislature to compel the city of New York to bear the whole cost of the Erie canal? or to construct at its own cost the Erie railroad? Or might the whole cost of the Hoosac tunnel be thrown upon Boston? Or might Chicago or St. Louis be compelled to construct a system of railways through the state, on the ground that in the opinion of the legislature the railways would specially benefit the city which was made a terminus? If a power to require such expenditures can rest in the hands of any legislature, restrained only by a sense of the responsibility of its members to their constituents, there is always a possibility that the members may at some time discover that a majority of the constituencies would be pleased to see the power exercised.¹

Another recent case in New York seemed to interpose a check to the unlimited power of the legislature over the taxation of municipal corporations. The point of the decision was, that towns could not be compelled to give aid to railroad corporations by subscribing to their stock. The decision was an

denying the authority to authorize the refunding of commutation moneys by towns, says: "The money was voluntarily paid, and without expectation of repayment. It was a gift—so understood, so intended by all the parties subscribing. It was no advance or loan to the town with the expectation of repayment. Whether the gift was to the soldiers enlisting, or to the town, makes no difference. The naked question recurs, Can the town raise money to give to individuals? This is not a gift to any public purpose. It is a gift as a recompense for past generosity. If a town can give to A. it can give to B. If it can give little it can give much. If it can give, then every man holds his estate subject to the will of the majority, who can give away as

much or little as they please. Taxation is for public purposes, and for those the right of the government to impose taxes is unlimited. Taxation is imposed by the state to meet its exigencies. But taxes to meet the plaintiff's claims would be taxes for a private purpose, for a gift to an individual."

¹ In *Freeland v. Hastings*, 10 Allen 570, 580, *Bigelow*, Ch. J., speaking of the right of the state to apportion among the municipalities the expense of highways, etc., says: "Perfect equality in the allotment of public burdens is unattainable. If they are distributed on just principles, applicable alike to all on whom they are imposed; if no undue discrimination is made among those on whom a charge or duty is laid; if no tax is assessed which is dis-

able one, and made by the court of last resort.¹ But this decision, so far as in the nature of things it would be possible, was shortly afterwards qualified, and, as it would seem, overruled by the assistant court, called the commission of appeals. The case decided by this court asserts a power in the legislature broader and more absolute than has ever been applied in this country, by any court of corresponding jurisdiction and dignity, whose decisions have fallen under our notice. The point of the decision was, that where the legislature had once empowered a commissioner, appointed for a town, but not by it or by any town officer or authority, to subscribe for the town to the stock of a railroad corporation, on the condition precedent of obtaining the assent of a majority of the resident taxpayers, the legislature had full power afterwards to remove the condition and empower the commissioner to bind the town by a subscription without it. "As it is obvious," say the court, "that all the property of a town, as an artificial being, is public property, and must usually have proceeded from the exercise of the power of taxation, and as the private rights of individuals residing in the town can only be affected through the exercise of the power of taxation, it follows that the substantial power of the legislature, through the power of taxation, is broad enough to sustain the requirement to a town to aid in the construction of a railroad, in the construction of which, in the judgment of the legislature, it has a public interest. And if it may do this directly by the imposition of a tax, and the direct and immediate employment of the money raised, it is not perceived how the issuing of bonds, with the only contingency of taxation to follow, can be beyond the legislative power, nor how the more remote possibility of becoming chargeable by reason of holding stock can alter the case."²

proportionate, or 'without the assent of the people or their representatives,' substantial equality will be attained, and no legal or constitutional right or privilege will be violated or evaded." This seems to us an admirable statement of the principles governing the imposition by the state of burdens upon the municipalities.

¹ *People v. Batchellor*, 53 N. Y. 128, opinion by *Grover*, J.

² *Johnson, Com.*, in *Duanesburgh v. Jenkins*, 57 N. Y. 177, 187. The decision in the case reversed the decision in supreme court made by Judges *James*, *Bockes*, *Rosecrans* and *Potter*.

As the commissioner who made the subscription was not a town officer, nor a town agent with the town's consent, it is manifest that he was able to accomplish what was said by the eminent Pennsylvania judge whose views have been quoted, to be "impossible in the nature of things"—a contract without the consent of the parties.¹

It must, we should suppose, be conceded that the doctrine that the legislature may do anything to which it gives the form of taxation, and which is not expressly forbidden by the constitution, is necessarily corrupting in practice. It constitutes a standing invitation to corrupt classes of the state to flock to the state capital with schemes for enriching themselves at the expense of localities; and it would be remarkable if they were not often successful. Perhaps, if the state were owner of important public works, a more tempting attraction might thereby be presented, and the municipalities be left unmolested. But even this might prove otherwise, for the evils of vicious legislation are likely to increase and multiply in every direction when once it is admitted that they are subject to no legal restraints, and that the central authority may legislate on local matters which concern only the locality, and concerning which the members acting will know nothing except as interested parties may undertake to inform or misinform them.

All the property of a municipal corporation may be assumed to come from taxation. If any of it comes from gift or grant, it is not believed that the nature of its ownership is any different on that account, unless the gift or grant was charged with a trust. It is public property, but public for the purposes of the municipality, and not for the purposes of the state. If any of it has been raised for special purposes, under state authority, the state may compel its proper application. The state must have a power of direction, also, in cases where municipal powers are so modified as to preclude the contemplated purpose being followed; but it is believed to be an unsound doctrine that the legislature of the state may, for that reason or any other, apply it to state uses, or even to local uses, against the consent of the people concerned. Mr. Justice *Story* early

¹ *Black*, Ch. J., in *Sharpless v. Philadelphia*, 21 Pa. St. 147, 165.
See, also, what is said by *Mellen*,

Ch. J., in *Bowdoinham v. Richmond*, 6 Greenl. 112, 114.

expressed the view that the legislature, changing, modifying, enlarging, or restraining the local powers, must secure the property for the use of those for whom, and at whose expense, it was originally purchased.¹ There can be little doubt that this is the view that has been generally acted upon, and that any other is, to say the least, less safe, either to the general interests of the state or the municipalities. It is very true, as has often been said, the fact that a power is liable to abuse is no argument against its existence; it would only constitute a reason which should influence the people to expressly withhold the grant of power when framing their constitution. But when it is considered that the states in general have not been accustomed to exercise such a power, and that its existence is inconsistent with any substantial constitutional protection to local self-government—that feature of the American representative system which has usually been looked upon as the corner-stone of all—and must leave the municipalities at the mercy of legislative majorities, it may justly be questioned whether the recognition of the power is not an innovation. It is not to be forgotten that the power in question is “a power to destroy”—an expression which loses none of its force when applied to municipal corporations,—and that it is capable of being exercised in legitimate modes to the destruction of private fortunes. And the subject seems to invite the remark, as bearing upon the question whether the early New York decision, which has been referred to, was not a departure from sound principle, that if the legislature of the state may vote the local taxes, or take the moneys which have been raised

¹ *Terrett v. Taylor*, 9 Cranch 43, 52. “It may also be admitted,” he says, in *Dartmouth College v. Woodward*, 4 Wheat. 518, 594, “that corporations for mere public government, such as towns, cities and counties, may, in many respects, be subject to legislative control. But it will hardly be contended that, even in respect to such corporations, the legislative power is so transcendent that it may, at its will, take away the private property of the corpora-

tion, or change the uses of its private funds acquired under the public faith. Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter, without any default of the corporators?” And, again, on p. 698, he says of the state: “It cannot recall its own endowments granted to any hospital, or college, or city, or town.” See, also, the discussion in *Meriwether v. Garrett*, 102 U. S. 472.

by taxation for local purposes, and appropriate them to other purposes in their discretion, on any assumption that, as they have now become public funds, they must be at the state's disposal, then the maxim that taxation and representation go together would seem to be merely a glittering generality, promising much, but assuring nothing.¹ For any reliance upon

¹ On this general subject, reference is made to the case of *Sleight v. People*, 74 Ill. 47. The facts were, that a railway was built through four townships—Oxford, Clover, Weller and Galva—of Henry county. Two of these townships—Weller and Galva—subscribed for capital stock and issued their bonds in payment of the subscription. The charter of the railroad company provided that "the taxes to be collected from said railroad company for county and township purposes, by the several counties and townships through which said railroad runs, shall be paid to and set apart by the county treasurer as a sinking fund to redeem the principal of the bonds issued by any township or townships in said county." On behalf of the railroad company, the claim was made that the entire tax collected from the railroad company, for county and township purposes, in the several townships through which said railroad runs, should be paid to and set apart by the treasurer of the county as a sinking fund, to be applied *pro rata*, in redeeming the principal of the bonds issued by the towns of Weller and Galva. *Schofield, J.*, considering this claim, says:

"The claim here made is for the taxes actually levied and collected for county and township purposes, from the railway company, in the towns of Oxford and Clover.

If this amount shall be taken, there must necessarily be a deficiency to that extent in the county and township revenues, which will have to be supplied by additional taxation. The property liable to taxation in one municipality will thus be compelled to bear a burden of taxation imposed by the corporate authority of a different municipality, and this, too, without its consent, and in the absence of any presumptive corresponding benefits. The principle upon which alone this can be sustained is, that the legislature may, in its pleasure, impose debts upon counties and townships, and require their payment without regard to the wishes of the inhabitants and taxpayers of such counties and townships; for it is evident that the practical result is precisely the same, whether it is said the taxes levied for county and township purposes on the property of the railway company in the towns of Oxford and Clover shall be set apart for the payment of the bonds issued by the towns of Weller and Galva, or that the county and these townships shall pay a sum equal to the amount out of their revenues for the same purpose. In either event, it is taking so much of the revenues of the county and of the towns of Oxford and Clover to pay the debts of the towns of Weller and Galva. But it has been repeatedly held by this court

responsibility to constituents, as a check upon extravagant taxation and reckless misappropriation, becomes useless, and indeed worse than useless, because deceptive, if the constituency in general, instead of bearing the burden of evil legislation, may actually, in some cases, have the general burden diminished by the selection of particular communities for exceptional and invidious taxation. And any principle in representative government may well be considered obsolete when, as applied, it only removes the substantial responsibility and restraining power from the constituency concerned to a distant central authority.

that the legislature is powerless to impose a debt upon a municipality against its consent; and those cases must be deemed conclusive on the questions involved here. *The People v. The Mayor*, etc., 51 Ill. 17; *People v. Salomon*, 51 Ill. 37; *People v. Chicago*, 51 Ill. 58; *Madison County v. People*, 58 Ill. 456; *Hessler v. The Drainage Com'rs*, 53 Ill. 105; *Lovington v. Wilder*, 53 Ill. 302; *Marshall v. Silliman*, 61 Ill. 218; *Cairo & St. L. R. Co. v. Sparta*,

77 Ill. 505; *Udike v. Wright*, 81 Ill. 49; *Choisser v. People*, 140 Ill. 21. See, further, *Elmwood v. Marcy*, 92 U. S. 289; *Allhands v. People*, 82 Ill. 234; *Board of Directors v. Houston*, 71 Ill. 318. A statute making a municipality liable for property destroyed within it by a mob, does not impose upon it indebtedness for "local or corporate purposes" against its consent, contrary to the Illinois constitution: *Chicago v. Manhattan Cement Co.*, 178 Ill. 372.

CHAPTER XXII.

THE REMEDIES OF THE STATE AGAINST COLLECTORS OF TAXES.

Remedies in general. It has been seen that the law sometimes provides very summary proceedings for the enforcement of the duty to pay taxes, and that the legislative competency to do so has been very fully sustained. With much greater reason may the law provide summary remedies against those who, having accepted official positions under the revenue laws, neglect or refuse to perform the duties which pertain to them, or endeavor to substitute a performance of their own for something of a different nature which the law has required. This is particularly true of tax-collectors; they have only to collect money and pay it over to the proper custodian, and it is seldom that a question arises which can justify departure from the strict terms of their authority, or neglect in the prompt payment of what comes to their hands. And whatever hardships there may be in forcing summary payment by the person who is simply negligent in paying his dues, there can be none whatever in requiring speedy accounting and settlement by one who has, by his office, become custodian of the public funds; and he has the less reason to complain, since whatever are the evils which may be anticipated in the case of individual neglects, they are likely to be multiplied many fold, if one who has collected from numerous persons may then neglect or refuse to pay over his collections until it shall suit his convenience to do so.

The remedies which are at the service of the public authorities, and one or more of which are usually made use of, are the following:

Suit at the common law. The state, or any of its municipalities, for which moneys have actually been collected, may pursue its delinquent collector by suit at the common law, if under the circumstances that remedy shall be deemed adequate

and suitable.¹ Where expedition is not important and the collector himself is unquestionably responsible, this may be all that is essential. Such a suit the collector can defend only on such grounds as would constitute a defense to a like suit as between other parties who stand in the relation of principal and agent. It would be a suit for money received by the collector for the use of the public; and he would not be permitted to rely on technical objections which might be made to the right of the public to the money.² If he receives the money to the use of the public, he should account for it; and it is immaterial that those who have paid it might successfully have resisted the collection from them. It has been elsewhere shown³ that a collector *de facto*, or even an intruder, will not be permitted to resist the demand of the state upon him for taxes collected, by showing that he collected them without due authority. And it has been held that although a bond to perform the duties of an office would be void if there were, by law, no such office in existence, yet an irregular appointment of a person to an office which is established by law is valid as a contract to perform

¹ *Helvey v. Huntington County*, 6 Blackf. 317; *Spencer v. Perry*, 18 Mich. 394; *Adams v. Farnsworth*, 15 Gray 423; *Wentworth v. Gove*, 45 N. H. 160. If a county treasurer refuses to pay over moneys to a village entitled to them, a bill will not lie to enjoin a misappropriation, but suit should be brought at law either against him or on his bond: *Hindman v. Aledo*, 6 Ill. App. 436.

² *Clifton v. Wynne*, 80 N. C. 145.

³ *Ante*, p. 439. See *Ford v. Clough*, 8 Me. 334; *Johnson v. Goodrich*, 15 Me. 29; *Orono v. Wedgewood*, 44 Me. 49; *Trescott v. Moan*, 50 Me. 347; *Seabrook v. Goss* (N. H.), 51 Atl. Rep. 253; *State v. Woodside*, 8 Ired. 104; *Lyndon v. Miller*, 36 Vt. 329. Where it is shown that defendant received the tax-books and acted as collector, it is not necessary

to produce his commission: *State v. Findley*, 101 Mo. 217. And when defendant was a *de facto* collector it is no defense that the tax-books were not, when delivered to him, authenticated by the county clerk's official seal, or that he failed to take the oath of office: *Ibid.* Where the collector gives bond and qualifies after the statutory time, and the tax-duplicate is given to him after he qualifies, neither he nor his bondsmen can deny, in an action on the bond to recover a balance collected on such duplicate and unaccounted for, that he was regularly qualified: *Commonwealth v. Stambaugh*, 164 Pa. St. 437. A *de facto* collector is liable to a town for money actually collected, but not for taxes which persons refused to pay because he was not lawfully an officer: *Lincoln v. Chapin*, 132 Mass. 470.

the duties of the office, and entitles the public to demand the fulfillment of the engagement.¹ The principles here stated are applicable not merely to the case of a defect in the official authority, but to the case also in which defects, either technical or substantial, might have been urged to the tax the officer has enforced.² The substantial fact is that he has received money for the state, and having done so, it is not his privilege to pause and question the right of the state to receive it; but he should pay it over, and leave those from whom it was received to present a claim to the state for the refunding, if they deny its right to retain it.³ Even an unconstitutional tax, once collected, the officer has no right to retain, but he should account as in other cases.⁴ To charge the collector it is not necessary to show a conversion. If he has received funds and refuses to pay them over on proper demand, or if the statute regulates the disposition to be made of them, and he fails to make it, he is accountable.⁵ The action in these cases is for the money

¹ *United States v. Maurice*, 2 Brock. 98.

² *Coons v. People*, 76 Ill. 383; *Lovington v. Trustees*, 99 Ill. 564; *People v. Cooper*, 10 Ill. App. 384; *Berrien County Treasurer v. Bunbury*, 45 Mich. 79; *Williams v. Holden*, 4 Wend. 223; *Olean v. King*, 116 N. Y. 355; *Moore v. Allegheny City*, 18 Pa. St. 55; *Webb County v. Gonzales*, 69 Tex. 455. See *Mast v. Nacogdoches County*, 71 Tex. 380.

³ *Commonwealth v. Philadelphia*, 27 Pa. St. 497.

⁴ In *Waters v. State*, 1 Gill 302, and *Smyth v. Titcomb*, 31 Me. 272, it was decided not to be a good defense to a suit to recover taxes collected, that the tax itself was unconstitutional. In *O'Neal v. School Com'rs*, 27 Md. 227, there was a like ruling as to a tax claimed to have been unlawfully levied. In *State v. Baltimore & Ohio R. Co.*, 34 Md. 344, this doctrine was applied to a railroad

company which, being required to pay to the state one-fifth of the fares on a certain branch, collected the fares, but declined to pay, alleging the unconstitutionality of the tax. See, also, *State v. Cunningham*, 8 Blackf. 339.

⁵ *Coons v. People*, 76 Ill. 383. The specific money collected belongs to the collector, and if he applies what is collected for one year upon a prior deficiency, the public authorities cannot compel a change of application: *Pratt's Appeal*, 41 Conn. 191. Collector 'chargeable' with interest from time of default: *Ross v. Walton*, 63 N. J. L. 435. Statutory penalty for sheriff's failure to pay over on proper demand "to the parties or funds entitled thereto" taxes collected by him cannot be imposed where no treasurer has been appointed and no order made by fiscal court directing payment to any person: *Pence's Administrator v. Nelson County*

had and received to the use of the public.¹ For a mere neglect to perform the official duty to collect, an action on the case would be the appropriate remedy.²

(Ky.), 53 S. W. Rep. 25. As to evidence sufficient to sustain collector's conviction in prosecution for embezzlement, see *State v. Findley*, 101 Mo. 217.

¹ A petition by the state auditor against a county tax-collector for state taxes not accounted for need not allege that the money has not been paid to the county: *State v. Seibert*, 148 Mo. 408. The word "tax" in a statute making a collector personally liable for the "amount of tax charged in the duplicate," includes the penalty which by force of the statute becomes part of the tax: *Harrisburg v. Guiles*, 192 Pa. St. 191. And in *Wheeling v. Black*, 25 W. Va. 266, it was held that a tax-collector is liable for amounts collected as interest on taxes. But as to retention by him of interest collected from delinquent taxpayers when he had paid over full amount of taxes committed to him, whether collected or not, see *Needham v. Morton*, 146 Mass. 476. As to application of payments and crediting to particular funds, see *Walling v. Morgan County*, 126 Ala. 326; *Pratt's Appeal*, 41 Conn. 191; *State v. Mathe*, 51 N. J. L. 216. Burden is on collector to show payment, but only to reasonable satisfaction of jury: *Walling v. Morgan County*, 126 Ala. 326. Evidence of amount with which collector is to be charged: *Ibid.* Lack of entries in public records showing payment over of taxes collected is evidence that they have not been paid: *New York v. Goldman*, 125 N. Y. 395. Tax-receipts given by collector to reported de-

linquents are evidence—open to explanation or rebuttal—that taxes reported as delinquent were in fact paid: *Hardy v. Logan County (Ky.)*, 23 S. W. Rep. 661. Unsigned reports of occupation taxes collected as evidence of amount received: *Mast v. Nacogdoches County*, 71 Tex. 380.

² *Charleston v. Stacy*, 10 Vt. 562. A collector is liable for taxes which by reasonable diligence he might have collected, but which, having negligently been left uncollected, have been lost: *Pittsburg v. Tabor*, 61 N. H. 100. State tax-collector held chargeable in Louisiana with full amount of tax-rolls and licenses, whole of which he is in the first instance presumed to have collected: *State v. Powell*, 40 La. An. 234. Collector neglecting to return warrant and account held liable for full amount of taxes specified in roll, and not already paid over to treasurer: *Olean v. King*, 116 N. Y. 355. Collector cannot escape liability for failure to collect taxes committed to him on ground that list contained no direction to collect: *State v. Atkinson*, 107 N. C. 317. Where an assessor fails to collect taxes which it was his duty to collect, it is immaterial whether he fails from neglect or from motives of personal popularity: *People v. Smith*, 123 Cal. 70. It constitutes no defense for a township collector that he was directed by the township committee not to collect a tax which, though illegal, had not been set aside; such direction being illegal: *Painter v. Blairstown*,

It is not the right of the collector, in a suit against him for taxes collected, to set off a demand owing to himself by the municipality for which he acts, even 'though it be for unpaid salary.¹

Collector's bond. It is a customary precaution to require of any collector of public moneys that he shall give bond to secure a proper accounting.² The form, or at least the requisites, of such a bond are commonly prescribed by statute, and statute remedies cannot be had upon it unless it is a good bond under the statute. But it is always lawful for one who has a duty to perform to a third person or the public, to give sureties for the performance thereof; and a bond by a public collector, which is not in the statutory form, may nevertheless be a good bond at the common law, upon which the usual common-law remedies will be available.³ On this ground suits have been

43 N. J. L. 317. Sheriff's mere failure to file list of delinquent taxes until after time prescribed by law held not to make him liable for uncollected taxes: *Gutches v. County Com'rs*, 44 Minn. 383. *Prima facie* case of failure to collect: *People v. Smith*, 123 Cal. 70.

¹ *Ante*, p. 20; *Waterbury v. Lawler*, 51 Conn. 171, explaining *Hartford v. Franey*, 47 Conn. 76.

² Sureties on a sheriff's general bond held liable for defaults in respect to state and county revenue alike, although no additional bond was required or given: *Indiana Bridge Co. v. Carr*, 95 Fed. Rep. 594, 37 C. C. A. 187. Sheriff's bond executed under the Kentucky statute for the faithful performance of his duties secures the collection of county as well as state revenue: *Pulaski County v. Watson* (Ky.), 50 S. W. Rep. 861; *Whaley v. Commonwealth* (Ky.), 61 S. W. Rep. 35. On a bond covering all official duties an assessor is liable for failure to collect poll

taxes, since the statute makes it his duty to collect such taxes: *People v. Smith*, 123 Cal. 70.

³ *Walker v. Chapman*, 22 Ala. 116; *Morse v. Hodsden*, 5 Mass. 314; *Freeman v. Davis*, 7 Mass. 200; *Burroughs v. Lowder*, 8 Mass. 373; *Sweetser v. Hay*, 2 Gray 49; *Horn v. Whittier*, 6 N. H. 88; *Claasen v. Shaw*, 5 Watts 468; *Treasurer v. Bates*, 2 Bailey 362; *Goodrum v. Carroll*, 2 Humph. 490; *Governor v. Allen*, 8 Humph. 176. A special bond given for a special bounty tax by the collector of state and county taxes would be good as a common-law bond whether required by law or not. The fact that the bond given described him as collector of special bounty tax when no such separate office existed did not avoid it. The bond requiring him to account for a special bounty tax of 1864, whereas the tax levied was for 1865, held that the figures 1864 might be treated as surplusage: *Coons v. People*, 76 Ill. 383. And see *Berrien*

sustained upon bonds which were given to one body or official board, when the statute required them to be given to another,¹ and also upon those which were so defective in any of their requisites as not to constitute a sufficient statutory bond.² If, however, the bond is given to an obligee different from that named in the statute, suit upon it should be brought in the name which appears in the obligation, though the suit will be for the use of the party entitled to the moneys collected.³ The important differences between a common-law bond and a statutory obligation are, that upon the former common-law remedies alone can be had; the statute will give no aid, either in respect to the right to institute suits or summary proceedings or to the incidents to suits when they are brought.⁴ Summary

County Treasurer v. Bunbury, 45 Mich. 79. The rulings in the federal courts are that a bond taken from a collector of taxes is good as a common-law bond, though not required by law, or though not in statutory form when a bond is required: *United States v. Tingley*, 5 Pet. 115; *Dixon v. United States*, 1 Brock. 177; *Postmaster General v. Rice*, Gilpin 554; *United States v. Howell*, 4 Wash. C. C. 620.

¹ *Van Hook v. Barnett*, 4 Dev. 268; *Justices v. Smith*, 2 J. J. Marsh. 472. And see *St. Joseph Supervisors v. Coffinbury*, 1 Mich. 335; *People v. Johr*, 22 Mich. 461, 462; *Mallory v. Miller*, 2 Yerg. 113. Where the statute required a tax-collector to pay when the law should direct, while his bond required him to pay when the county commissioners should direct, it was held in an action on the bond that there was no material variance, and that payment to the treasurer was in law payment to the commissioners: *Frownpelter v. State*, 66 Md. 80.

² If, in addition to the condition stating the statutory duty, a bond

contains a qualification which is beyond the statute terms and unreasonable, it may be regarded as a nullity and treated as surplusage: *Berrien County Treasurer v. Bunbury*, 45 Mich. 79.

³ *Walker v. Chapman*, 22 Ala. 116; *Stevens v. Hay*, 6 Cush. 229; *Governor v. Humphreys*, 7 Jones L. 258. It may, perhaps, be otherwise when the obligee's name is merely formal. See *Dudley v. Chilton County*, 66 Ala. 593; *Haynes v. Butler*, 30 Ark. 69; *Bay County v. Brock*, 44 Mich. 45. County tax-collector's bond payable "to whomsoever it might concern" should, under statute requiring every action to be prosecuted in name of "the real party in interest," be sued by school trustees with whom he has failed to make his annual settlement, and to whom he has not paid over the full amount of all school taxes due: *Walton v. Jones*, 7 Utah 462.

⁴ *Calhoun v. Lunsford*, 4 Port. (Ala.) 345; *Justices v. Smith*, 2 J. J. Marsh. 472; *Lord v. Lancey*, 21 Me. 468; *Stevens v. Hay*, 6 Cush. 229; *White v. Quarles*, 14 Mass. 451; *Sweetser v. Hay*, 2

proceedings are therefore inadmissible on a mere common-law obligation, because the common law never gave them. What has been said of the liability of the collector, to account for moneys received, is as applicable in a suit on any such bond, as in a suit for money had and received; if the terms of the bond cover the case, neither he nor his sureties can defend by showing that those who voluntarily have paid to him could not legally have been compelled to do so.¹

But the liability upon the collector's bond must in all cases be governed by the condition; the sureties have undertaken for nothing more, and their obligation is to be strictly construed.² It is important, therefore, in every case to see precisely what it is which the sureties undertake that their principal shall do. If they undertake that he shall "faithfully perform his duty, and pay over the moneys collected," they are liable for the moneys collected by him, whether with warrant or without, for his duty is to pay over all such moneys.³ The substan-

Gray 49; *Pickering v. Pearson*, 6 N. H. 559; *Kinney v. Ethridge*, 3 Ired. 360.

¹ See cases cited *ante*, pp. 1324, 1325. Also, *People v. Gillespie*, 47 Ill. App. 522; *Police Jury v. Brookshier*, 31 La. An. 736; *Kellar v. Savage*, 20 Me. 199; *State v. Harney*, 57 Miss. 863; *Schuster v. Weissmann*, 63 Mo. 552; *Feigert v. State*, 31 Ohio St. 432; *Anderson County v. Hays*, 99 Tenn. 542; *Morris v. State*, 47 Tex. 583; *Swan v. State*, 48 Tex. 120; *Webb County v. Gonzales*, 69 Tex. 455. Nor can he excuse himself from payment on the pretense that he fears claims against him by taxpayers: *Gilbert v. Dougherty County*, 53 Ga. 191. Nor that he paid over the moneys collected to make up a deficiency on the tax of the previous year: *Wilkinson v. Bennett*, 56 Ga. 290. The fact that the sheriff collects a tax before receiving the list does not relieve his sureties from liability: *Combs*

v. Breathitt County (Ky.), 46 S. W. Rep. 505.

² Where the collector's bond provided that he should collect the taxes and pay them over to the state and county treasurers, there was no liability thereon for failure to pay fees due a publisher for advertising the sale of lands for taxes, though it was the collector's duty to pay such fees: *State v. Montague*, 34 Fla. 32. On a collector's bond to "well and truly pay over all moneys collected by him by virtue of his said office," he and his sureties are liable for moneys received by him from the collection of the preceding term: *Haley v. Petty*, 42 Ark. 392.

³ *State v. Montague*, 34 Fla. 36; *Johnson v. Goodridge*, 15 Me. 29; *State v. Woodside*, 8 Ired. 104; *Commonwealth v. Stambaugh*, 164 Pa. St. 437. And see *Lawrance v. Doolan*, 68 Cal. 309; *State v. Rushing*, 17 Fla. 226; *Ford v. Clough*, 8 Greenl. 234; *Orono v. Wedgewood*,

tial inquiry will be, whether the officer "by virtue of his office has received money for the state. If he has, it is not his province to dispute the right of the state to receive it, unless the case shows that the taxpayer has demanded it and he has refunded it" for lawful reason.¹ On the other hand, if the sureties merely undertake for the collection of all rates for which the collector shall have "sufficient warrant under the hands of the assessors," a recovery cannot be had upon the bond for moneys which have not been collected by him by virtue of such warrant; the case not being brought by the facts within the terms of their obligation.²

From what has already been said it will be understood that it is not the business of the collector to question the fairness or propriety of any tax which has been committed to him for collection. If the assessment is exclusive, the party assessed must make the objection, and not the assessor. His duty is to collect the list committed to him, and he cannot excuse himself for any failure to exhaust his authority in collecting on the pretense that the person taxed should not have been assessed at all, or should have been assessed otherwise than as he was.³

44 Me. 49; *Trescott v. Moan*, 50 Me. 347; *Williamstown v. Willis*, 15 Gray 427.

¹ *Timberlake v. Brewer*, 59 Ala. 108. In California the collector is bound to pay over money collected, even though it was paid under protest and suit has been brought to recover it back: *San Francisco v. Ford*, 52 Cal. 198. And in that state money paid to a city tax-collector by a claimant of outside lands in satisfaction of an assessment levied thereon is received by the collector in his official capacity, and his sureties are liable if he fails to return the money on its being adjudged that the claimant was not owner of the lands: *Lawrance v. Doolan*, 68 Cal. 309. Sureties on a collector's bond cannot avail themselves of the invalidity of the grand list as

a defense: *Montpelier v. Clark*, 67 Vt. 479.

² *Foxcroft v. Nevens*, 4 Me. 72. An error not chargeable to himself, which deprives a collector of one mode of collecting which otherwise he would have had, will relieve him of the duty of collecting, and his failure to collect will therefore not be a breach of his bond: *Harpwell v. Orr*, 69 Me. 333.

³ See *Wilkinson v. Bennett*, 56 Ga. 290; *Walden v. Lee County*, 60 Ga. 296; *Williams v. Holden*, 4 Wend. 223; *Moore v. Allegheny City*, 18 Pa. St. 55. A tax-collector is not entitled to deduct from amounts due the state for taxes collected, the costs of the publication of tax-sales: *State v. Guilbeau*, 37 La. An. 718. A collector who has failed to comply with the statutory requirements as to al-

Nor can he answer for a neglect of duty in attempting to collect by showing that the poverty of the person taxed would probably have made the attempt ineffectual; his duty is to exhaust his power under the warrant, and the legal evidence of the inability of the person taxed to pay the amount charged against him will then be furnished by his official return.¹ He is, however, entitled to a *quietus* for taxes with which he became chargeable during his term, but which he was by order of court enjoined from collecting.²

But while the collector is not, in general, to be heard to question the validity of a tax which he has collected, he may always refuse to proceed in the collection of one for the enforcement of which his authority is insufficient. While he is bound to account for all sums voluntarily paid to him by persons taxed, he is under no obligation to commit trespass in the attempted exercise of a void authority; and it is always a defense to him and his sureties, that the process committed to him would not have protected him in its execution.³ Undoubtedly, also, the

allowance of deduction lists as credits cannot set up these lists in defending an action on his official bond: *State v. Viator*, 37 La. An. 734.

¹ *Gorham v. Hall*, 57 Me. 58; *Colerain v. Bell*, 9 Met. 499; *Treasurers v. Hilliard*, 8 Rich. 412. The sureties undertake not only for the collector's honesty, but for his skill and diligence. If he has power to enforce payment by solvent parties and is entitled to credit for what he cannot collect from insolvents, he is chargeable with all uncollected taxes appearing when the settlement should be made, and for which he has not obtained credit. And the sureties are chargeable also: *State v. Lott*, 69 Ala. 147.

² *Commonwealth v. Masonic Temple*, 89 Ky. 658.

³ *State v. Rushing*, 17 Fla. 226; *Reynolds v. Lofton*, 18 Ga. 47; *Barlow v. The Ordinary*, 47 Ga. 639; *Cheshire v. Howland*, 13 Gray

321; *Adams v. Farnsworth*, 15 Gray 423; *Weimer v. Bunbury*, 30 Mich. 201; *Stanberry v. Jordan*, 145 Mo. 371. The mere fact that the collector did not have a warrant held not to relieve his bondsmen from liability for uncollected taxes: *Harrisburg v. Guiles*, 192 Pa. St. 191. And in proceedings against a sheriff for corruptly refusing to collect a tax-warrant, it need not be shown that the warrant was regular on its face: *Rutter v. Territory (Okl.)*, 68 Pac. Rep. 507. Where statutes constituted a sufficient warrant of authority a collector was held chargeable with all taxes which he failed to collect, even though the judge of probate had failed to comply with the statutory requirement as to making and delivering to him a book containing the amount of taxes due from each taxpayer, etc.: *Jackson County v. Gullatt*, 84 Ala. 243.

collector may decline to proceed in the collection of a tax illegally levied; as any person may refuse to recognize any illegal authority, or to obey an unconstitutional law. But he takes upon himself a great responsibility when he assumes to question the validity of a statute, or of the acts of his superiors. In any case he ought to be the last person to raise the question, and then only when necessary to his own protection. So long as the persons taxed voluntarily make payment of the tax, it is his duty to proceed with the collection.

It has been said on a preceding page,¹ that the collector should receive for the taxes money only, unless the statute permits him to receive something different. Money is always understood in the tax laws when nothing else is mentioned.² Laws are sometimes passed making county or municipal obligations receivable for taxes or for some kinds of taxes, and when such laws exist, any obligations coming within their terms must be received, and a tender of them to the collector would discharge the lien of the tax.³ The same is true of

¹ *Ante*, p. 804.

² See *United States v. Morgan*, 11 How. 154; *Miltenberger v. Cooke*, 18 Wall. 421; *Johnson v. United States*, 5 Mason 425; *Lof-
tin v. Watson*, 32 Ark. 414; *Hart-
ford v. Franey*, 47 Conn. 76; *West
Baton Rouge v. Moores*, 27 La. An.
459; *Jones v. Wright*, 34 Mich. 371.
See, also, the cases cited *ante*, pp.
804, 805.

³ *Daniel v. Askew*, 36 Ark. 487. The collector cannot refuse to re-
ceive part payment because all is
not tendered: *Coit v. Claw*, 28
Ark. 516. A provision that state
taxes may be paid in state war-
rants, county and township taxes
in county and township warrants,
respectively, does not bind the
taxpayer to make payment of each
tax in the obligations mentioned,
but he may pay in other funds:
English v. Oliver, 28 Ark. 317.
See *Wallis v. Smith*, 29 Ark. 354,
for a discussion of Arkansas acts

making state and county scrip
receivable for taxes. County war-
rants issued since the adoption of
the constitution of 1874 are not
receivable in payment of a tax
levied to pay indebtedness exist-
ing at the time of such adoption.
*Lof-
tin v. Watson*, 32 Ark. 414. Where a county board levies a tax
in currency which should have
been levied in warrants, the col-
lector must nevertheless collect in
currency: *Graham v. Parham*, 32
Ark. 676. But it seems that even
when he has collected in currency,
if he pays county warrants to the
treasurer his official liability is
discharged, because the law makes
the warrants a legal tender by the
collector in payment of his in-
debtedness on account of the tax:
Asken v. Columbia County, 32 Ark.
270. But see cases in second note
following. For a case of refusal to
enjoin a collection in scrip where
it appeared impossible to collect

state obligations which by their terms or by the law under which they are issued are receivable for taxes; the state in issuing them makes a contract with the creditors receiving them which it must abide by.¹ But the collector cannot exercise the option of the taxpayer to pay in something besides money, in his own interest, and he cannot therefore make demands, which are by law made receivable for taxes, available to him in his settlement, unless he actually received them in payment.² The collector must also at his peril keep safely and account for whatever comes to his hands. It is no defense, when he is sued for a failure to account, that the moneys have been stolen from him, or otherwise lost, without fault or negligence on his part.³ This seems a very harsh rule, but it is, without question, a very necessary one.

When the time arrives for the collector to account and pay over his collections, no demand is necessary in order to fix upon him and his sureties a liability for failure to do so; but they may be sued at once, as soon as a default has occurred.⁴

otherwise, see *Ranger v. New Orleans*, 2 Woods 128. Compare *Auditor v. Treasurer*, 4 S. C. 311. As to judgment against collector for refusing payment in coupons from state bonds, see *Mallan v. Bransford*, 86 Va. 675.

¹ *Antoni v. Greenhow*, 107 U. S. 769; *Baltimore, etc. R. Co. v. Allen*, 17 Fed. Rep. 171; *Burgess v. Winston*, 28 Fed. Rep. 559. If a township treasurer receives logs in payment he cannot, unless he receives money for them, be convicted, should he fail to turn over their value to his successor, of knowingly and unlawfully appropriating to his own use the township's money: *People v. Seeley*, 117 Mich. 263.

² *Commonwealth v. Rodes*, 5 T. B. Monr. 318. See *Freir v. State*, 11 Fla. 300; *Cheshire v. Howland*, 13 Gray 321. The collector has no right to receive in payment of taxes the draft of his creditor

upon himself: *Elliott v. Miller*, 8 Mich. 132.

³ *United States v. Prescott*, 3 How. 578; *United States v. Morgan*, 11 How. 154; *United States v. Dashiell*, 4 Wall. 182; *Morbeck v. State*, 28 Ind. 86; *Muzzy v. Shattuck*, 1 Denio 233; *State v. Harper*, 6 Ohio St. 607. See *State v. Houston*, 78 Ala. 576, 83 Ala. 361. The rule held to be otherwise where public moneys in the hands of a public officer were seized by the rebel authorities by force: *United States v. Thomas*, 15 Wall. 337; *United States v. Huger*, 1 Hughes 397. And in Iowa, where the terms of the bond are that the officer shall exercise "reasonable diligence and care," he is not liable if, notwithstanding due care, the money is stolen from him. *Rose v. Hatch*, 5 Iowa 149. Compare *State v. Lanier*, 31 La. An. 423.

⁴ *State v. McIntosh*, 9 Ired. 307;

The official bond of a collector is for the protection of the public, and not of individuals who may be injured by his trespasses or his neglect.¹ But under proper legislation a bond running to the state may cover the collection of municipal taxes, and be subject to suit by the municipal authorities.² In some states the bond, from the time of its execution, operates as a lien upon the collector's property.³

State v. Woodside, 9 Ired. 496. In an action against a collector's bondsmen proof that at the end of his term he was in default makes out a *prima facie* case, and on the defendants lies the burden of showing payment: Mendocino County v. Johnson, 125 Cal. 337. In debt on a collector's bond plaintiff must first show that defendant has been legally authorized to collect the taxes, or that he has collected them; then defendant has the burden of showing faithful performance of his duty: Machiasport v. Small, 77 Me. 109. Collector's refusal on demand of a defunct municipality to pay over money collected by him for taxes is no breach of his bond: Dodge v. People, 113 Ill. 491. In West Virginia a sheriff who is collector of school taxes may not pay over a fund in his hands to his successor in office without direction of the board of education, and if he does his sureties are liable: Spencer Dist. Education Board v. Cain, 28 W. Va. 758. How liability of bondsmen determined in Vermont: Ferrisburgh v. Martin, 60 Vt. 330. Where a treasurer by mistake pays to one district moneys belonging to another, the payment is no protection: People v. Yeazel, 84 Ill. 539. Collector's failure to account for the collections of one year not excused by his having paid them over to make up a balance of a previous

year: Wilkinson v. Bennett, 56 Ga. 290. As to admission of evidence of payments other than those accounted for in the complaint in an action for default, see Mendocino County v. Johnson, 125 Cal. 337. It was decided in Combs v. Breathitt County (Ky.), 46 S. W. Rep. 505, that a judgment on a sheriff's bond for taxes collected under assessments by the county assessor does not bar an action on the same bond for taxes collected under assessments made for the same year by the railroad commissioners, the account not being a unit. As to collector's liability in Maine to indictment for not accounting, see State v. Walton, 62 Me. 106. See, also, People v. Brin-gard, 39 Mich. 22.

¹ State v. Montague, 34 Fla. 36; Clark v. United States, 60 Ga. 156; State v. Harris, 89 Ind. 363; Brown v. Phipps, 6 S. & M. 51. Public moneys cannot be garnished by a creditor of the collector: Goldsmith v. Kemp, 58 Ga. 106.

² Haynes v. Buller, 30 Ark. 69. See Dudley v. Chilton County, 66 Ala. 593.

³ See Schuessler v. Dudley, 80 Ala. 547; Irby v. Livingston, 81 Ga. 281. This lien extends to the homestead owned and occupied by the collector at the time of the execution of the bond: Schuessler v. Dudley, *supra*. It also extends to property acquired by him after

Liability of sureties. The liability of a surety on an official bond corresponds to that which others take upon themselves when they assume responsibility for third persons. It may or may not be the same responsibility which rests upon the principal himself. The position of the officer is essentially different from that of his surety. The officer in accepting the official position accepts it charged with duties; and if he fails to perform them, he is legally responsible for the failure. But the surety assumes no responsibility except as he does so by the terms of an express contract, and the law charges him with nothing further. Any responsibility on his part must therefore be gathered from the very terms of the contract, and made out on strict construction.¹ It follows, therefore, that if any alteration is made in the obligation after the surety has become a party to it, but without his consent, the alteration discharges him since it is no longer his contract.² This would be the case even though the alteration intended to diminish the surety's responsibility, instead of to increase it; on the plain principle that contracts rest upon consent, and when there has been no consent there can be no contract.³

The principle above stated applies to a case in which, by arrangement between the collector and the public authorities,

the execution of the bond: *Baker v. Scheussler*, 85 Ala. 541. The mortgage resulting in Louisiana from the recorded bonds of a sheriff covers the amount of state, parish, and levee taxes that are delinquent: *Pearce v. State*, 49 La. An. 643.

¹ *Miller v. Stewart*, 9 Wheat. 680, 702; *United States v. Boyd*, 15 Pet. 187; *Leggett v. Humphreys*, 21 How. 66; *Swanson v. Ball*, Hempst. 39; *Walsh v. Bailie*, 10 Johns. 180. A bond conditioned for the taxes of 1872 and 1873 will not cover those of 1874: *Prince v. McNeill*, 77 N. C. 398.

² *Gass v. Stinson*, 2 Sumn. 453; *Smith v. United States*, 2 Wall. 219; *Dover v. Robinson*, 64 Me. 183.

³ "The alteration of the bond, after it was executed by the defendants, and without their consent, discharged them from all liability under it. It does not now truly represent the obligation into which they entered. That obligation was that Jonathan Eldridge should act faithfully as collector of a tax of \$2,572.82, which had been already assessed; by the alteration of the bond, the obligation which it purported to impose on the defendants was, that the said Eldredge should act faithfully as collector of a tax of \$2,490.01, which was assessed after the bond was executed. This obligation they never consented to incur:" *Metcalf, J.*, in *Doane v. Eldredge*, 16 Gray 254.

based on legal consideration, some favor or privilege is granted him which in effect works a change in the contract though its terms are not altered. A pertinent illustration would be that of the authorities extending the time for the collector to account for moneys already collected, whereby, if the sureties remained chargeable, their responsibility would be continued in point of time and exposed to further risks. In the case of obligations in general, this cannot be done except with the consent of the sureties, and the principle applies with full force to the case of official bonds. But the rule would not apply to the official bonds of collectors of taxes, in any case where the law in force when the bond was given authorized the indulgence which has been granted, since the bond must be understood as being given with the law in view, and subject to anything that may lawfully be done under it. And even in the absence of any such law, if the legislature by special act or otherwise should give or permit to be given to a collector an extension of time to complete his collections, it would seem that the sureties would be in no position to object, since what is done is in the nature of a favor to them, to the extent that the collector is enabled to make further collections. Moreover the extension when granted does not bind the state; it is given without legal consideration, and may be repealed at any time.¹ But if the term of office is extended, the sureties are not responsible for the acts or defaults of the principal during the extended term.²

¹ *Smith v. Peoria*, 59 Ill. 412; *State v. Carlton*, 1 Gill 249; *State v. Swinney*, 60 Miss. 39; *Olean v. King*, 116 N. Y. 355; *Prairie v. Worth*, 78 N. C. 169; *Worth v. Cox*, 89 N. C. 44; *Nashville v. Knight*, 12 Lea 700; *Commonwealth v. Holmes*, 25 Grat. 771; *Bennett v. McWhorter*, 2 W. Va. 441. Sureties are not discharged by the supervisors taking a new bond for which the law makes no provision, nor by their names being stricken off by the supervisors without authority: *State v. Mathews*, 57 Miss. 1. See *State v. Har-*

ney, 57 Miss. 863, for a discussion of questions of duress in the giving of the bond, and of alteration. It is immaterial to the liability of the sureties that the bond was given after the time when by statute the principal's office might have been declared vacant: *Harris v. State*, 55 Miss. 50. As to what must be shown in a suit on the bond to charge the collector and his sureties, see *Houston County v. Dwyer*, 59 Tex. 113.

² *Brewer v. King's Sureties*, 63 Ala. 511. See *Brown v. Lattimore*, 17 Cal. 93. Where a collector fails

Sureties cannot question the appointment of the collector under which their bond was given,¹ and if the principal was his own successor, and reported a sum of money on hand at the beginning of his second term, the sureties for that term are liable for it if it is not subsequently accounted for.² In such a case the breach of the bond consists in the failure to account, and the breach occurs in the term when the accounting should take place.³ If the collector is lawfully superseded in his office, and turns over his uncollected rolls to his successor, the sums for which he and his sureties are then liable to account are not those shown by the rolls, but those which have been actually collected upon them — the transfer of the rolls reliev-

to give a new bond when called upon as required by law, the sureties continue liable for subsequent defaults: *Tinsley v. Rusk Co.*, 42 Tex. 40. That a collector may be required to give a new bond without first having been cited to appear and show cause, see *Poe v. State*, 72 Tex. 625.

¹ *Chapman v. Commonwealth*, 25 Grat. 721.

² *Morley v. Metamora*, 78 Ill. 394. See *Bruce v. United States*, 17 How. 437; *Hartford v. Franey*, 47 Conn. 76; *Commissioners v. McCormick*, 4 Mont. 115. As to the liability of sureties in different bonds where the collector was his own successor for several terms, and the sureties in the several were not the same, and defaults existed in each term: *United States v. Eckford*, 17 Pet. 251, 1 How. 520; *Phipsburg v. Dickinson*, 78 Me. 457; *Detroit v. Weber*, 29 Mich. 24.

³ *Woods v. Varnum*, 85 Cal. 639. Where a sheriff as tax-collector executes a new bond with sureties before there has been any default on the old bond, a subsequent default will be applied to the new

bond: *State v. Wade*, 15 W. Va. 54. Sureties are liable for taxes collected during the collector's term upon assessment rolls received during a prior term: *United States v. Stone*, 106 U. S. 525. Under a charter providing that a tax-collector shall be elected "for the term of two years," and containing no restrictive words, he continued to hold until his successor was appointed, and for breaches of his bond occurring in the interval between the expiration of the two years and the appointment of his successor his sureties were liable: *Wheeling v. Black*, 25 W. Va. 266. Under Pennsylvania statutes a collector and his sureties are liable for all the taxes on the duplicate delivered to him, whether collected during the term for which the bond was given or afterwards: *Commonwealth v. Stambaugh*, 164 Pa. St. 437. A bond conditioned for collection of taxes during the officer's continuance in office will cover taxes laid in a year prior to his election if he actually collects them: *Commissioners v. Taylor*, 77 N. C. 404.

ing responsibility as to the remainder.¹ A collector's admission of payment is not conclusive upon his sureties, and therefore, if he gives receipt for taxes as paid which are not paid in fact, his sureties are not responsible as for actual payment;² nor are they accountable for a sum which he collects as a tax, but which in fact was never levied.³ When a collector who has several taxes for collection pays over moneys and directs upon which tax they shall be applied, the direction is equivalent to an application, and the receiving officer cannot apply them otherwise without consent of the treasurer and his sureties.⁴

¹ *West Baton Rouge v. Morris*, 27 La. An. 459; *State v. Daspite*, 30 La. An. 1112; *Police Jury v. Brookshier*, 31 La. An. 736. As to the rights of sureties in a general and a special bond of the collector as between themselves, see *Cherry v. Wilson*, 78 N. C. 164. Sureties are severally liable among themselves for the whole amount for which they have signed: *Police Jury v. Brookshier*, 31 La. An. 736. As to the liability of one surety to another when the latter has been compelled to make good a principal's default, and the former has, by a division of profits with the collector, received more than the amount delinquent, see *McLewis v. Furgerson*, 59 Ga. 644. The payment by a collector to any but a person authorized to receive it does not rid him of liability, but if in good faith he so pays and the municipality gets the benefit of the money, it should in equity reimburse him: *School Directors v. Delahoussaye*, 30 La. An. 1097. See, for the same principle, *Burns v. Bender*, 36 Mich. 195; *Clifton v. Wynne*, 80 N. C. 145. If the principal is put into bankruptcy the sureties cannot complain that he is not arrested or his goods seized before suing

them: *Richmond v. Toothaker*, 69 Me. 451. They are liable though the principal is discharged in bankruptcy: *Richmond v. Brown*, 66 Me. 373.

² *Hartford v. Franey*, 47 Conn. 76; *Reutchler v. Hucke*, 3 Ill. Ap. 144. A tax-collector has no power to compromise a claim for taxes: *Trustees v. Guenther*, 19 Fed. Rep. 395.

³ *Greenwell v. Commonwealth*, 78 Ky. 320. A collector's sureties are liable for license taxes which he should have collected, even though the licenses do not expire until after the time for his accounting: *Crawford v. Carson*, 35 Ark. 565. Where it is the duty of a treasurer to give a special bond upon the receipt of certain taxes, it is not the duty of the collector, before paying them over, to inquire whether such bond was given: *Woodall v. Oden*, 62 Ala. 125.

⁴ *Readfield v. Shaver*, 50 Me. 37; *Norridgewock v. Hale*, 80 Me. 362; *State v. Wade*, 15 W. Va. 524. Where taxes are assessed and paid into the treasury by a railroad company for the last year of a sheriff's term, and he has given a bond covering such taxes, the auditor, unless specially directed by

Where a collector's bond is in general terms, and conditioned for the faithful performance of his duties, or for the payment of all moneys collected by him, if by subsequent legislation new taxes are provided for, the collection of which is committed to the collector, his sureties are liable in respect to such taxes to the same extent as if they had been provided for before the bond was given. And this is so even though in providing for the further tax an additional bond was authorized to be taken, but which was not called for or executed.¹ But the law will not intend that new duties not yet existing, and not germane to the office, were within the contemplation of the sureties, or of their undertaking, when they entered into it; and therefore the bond of a sheriff, who is not the general collector of taxes, will not be held to cover his duties in respect to the collection of a special tax subsequently imposed upon him.² But the imposition of new duties upon the office will not affect the liability of the sureties in respect to such as were imposed upon it when their bond was given.³

The repeal of the law under which the bond was given does not affect the responsibility of the sureties, whose contract remains in full force as before.⁴

In many cases it is made the duty of some auditing board or

the sheriff, must apply such payments to the taxes for the years for which they were assessed: *Taylor v. La Follette*, 49 W. Va. 478. A collector and his sureties are not relieved from liability for misappropriation of money collected by the fact that such money was, without the consent of the selectmen of the town, applied upon a deficiency of a previous year: *Carpenter v. Corinth*, 62 Vt. 111; *Montpelier v. Vermont*, 67 Vt. 479. See *Wilkinson v. Bennett*, 56 Ga. 290.

¹ *State v. Hathorn*, 36 Miss. 491. See *Pearce v. State*, 49 La. An. 643; *Stevenson v. Bay City*, 26 Mich. 44.

² *White v. East Saginaw*, 43 Mich. 567.

³ *Commonwealth v. Holmes*, 25 Grat. 771; *Smith v. Commonwealth*, 25 Grat. 780. If a collector fails to make collection of a tax by sale of a homestead when he might do so, he becomes liable, and a subsequent exemption of the homestead from sale will not relieve him: *Brooks v. State*, 54 Ga. 36. See *Davis v. State*, 60 Ga. 76.

⁴ *Tucker v. Stokes*, 3 S. & M. 124. See, for special cases of liability on a collector's bond, *State v. Hill*, 17 W. Va. 452; *Shaw v. State*, 43 Tex. 355; and for heavy damages on default—thirty per cent., *State v. Lowenthal*, 55 Miss. 589; and for presumption of legal performance of duty, *Supervisors v. Rees*, 34 Mich. 481.

other authority to examine the collector's accounts periodically, and come to a settlement with him for previous collections. Undoubtedly all such boards or authorities should perform their duty, and give the sureties such benefit as might accrue to them therefrom; but the legal view of provisions of law imposing such duties is, that they are made, not for the protection of sureties, but of the public. The sureties undertake for the conduct of the principal, and cannot require the state to protect them against his misconduct or neglect. If, therefore, they suffer from neglects which are not only his neglects, but also those of some other public officer or board, the loss must be borne by themselves. If periodical settlements would tend to their advantage, they will be expected to look after them in their own interest.¹

Summary remedies. So far, we have spoken of obligations and remedies, in providing for which no serious question of legislative power could well arise. But in the case of collectors of the public revenue, it has sometimes been thought important to compel them to place themselves under obligations and subject themselves to liabilities not demanded in other cases. Provisions of the following import are often met with:

1. That the statement of accounts by the state auditor or other public accountant shall, as between the state and its collector, be conclusive.
2. That, when the collector is in default, process in the nat-

¹ United States v. Kirkpatrick, 9 Wheat. 720; United States v. Van Zandt, 11 Wheat. 184; United States v. Nicholl, 12 Wheat. 505; Dox v. Postmaster-General, 1 Pet. 318; Osborne v. United States, 19 Wall. 577; Ryan v. United States, 19 Wall. 514; Ex parte Christian, 23 Ark. 641; Christian v. Ashley County, 24 Ark. 142; Marlar v. State, 62 Miss. 677; Detroit v. Weber, 26 Mich. 284; State v. Atherton, 40 Mo. 209; State v. Bates, 36 Vt. 387, 398. If a collector is appointed who has, unknown to the surety, previously been a de-

faulter in the same office, the surety cannot claim release on the ground that the state has deceived him by appointing such a man: State v. Rushing, 17 Fla. 226. To the same effect, Frownpelter v. State, 66 Md. 80; Harrisburg v. Guiles, 192 Pa. St. 191. Sureties not released by neglect of officers whose duty it was to report collector's first default: Marlar v. State, 62 Miss. 677. As to finality of settlement, see State v. Powell, 40 La. An. 234; Commonwealth v. Scanlan (Pa.), 51 Atl. Rep. 986.

ure of an execution may be issued against him by his superior officer, without any judicial finding, or any hearing, and this process shall be collected of the property of the collector and his sureties.

3. That, on application to some specified court, summary judgment may be taken against the collector on motion, without other process than short notice to show cause.

Upon this is to be remarked that the justification of such remedies must be found in the contract relations established between the state and the collector by the acceptance of office by the latter while such provisions are in force, and between the state and the obligors in the official bond by their giving the bond under the statute which provides this summary remedy. The bond, in such a case, is to be read as if the provisions of the statute were set forth at large in it, and had thereby received the express assent of the parties.¹ And this removes the difficulty that would otherwise exist were the rights of a party to be concluded without giving him the opportunity of a judicial hearing.

It has been affirmed in Kentucky that it is competent to make the auditor's statement of the amount of taxes evidence against the sheriff who acted as collector of taxes in a proceeding against him for an accounting, and also in favor of the sheriff and against his deputy, who received the list to collect; and to give a summary remedy against both.² And, in another case, it was more distinctly decided that the auditor's statement must be conclusive where the statute so declares. "We acknowledge," it is said, "that this . . . does curtail the privilege of defense to be made by a collector, and places him on a footing different from that of other defendants in our courts, and we have no doubt that it is necessary to do so for the security of the revenue, and that, without it, not only great confusion would be produced in the finances of the state, but many frauds would be practiced on the treasury. If this de-

¹ *Murray v. Hoboken Land Co.*, 18 How. 272; *Whitehurst v. Coleen*, 53 Ill. 247; *Chappee v. Thomas*, 5 Mich. 53; *Lewis v. Garrett's Adm'r*, 6 Miss. 434; *People v. Van Epps*, 4 Wend. 387, 390; *Philadel-*

phia v. Commonwealth, 52 Pa. St. 451; *Pratt v. Donovan*, 10 Wis. 378.

² *Johnson v. Thompson*, 4 Bibb 294. The point only arose incidentally in this case.

fense of tender and refusal, or discount, or whatever it may be called, is allowed, what will soon be the consequence? The collectors need never settle their accounts with the proper department, for, if they do, it will only acquit them of costs. [And, after suggesting the probable evil results, it is added:] To prevent this the state has selected its own auditor, and required every claim to pass through his hands before any can be allowed, or any debtor be released. This rigor with regard to officers of the revenue is not new in the science of government.¹

In other cases similar statutes have been enforced without any question being made of the competency to adopt them.²

A summary distress warrant against the collector and his sureties can only be awarded where the bond is in accordance with the statute, and where all the statutory conditions exist.³ The process being extraordinary and in derogation of the common law, the steps leading to it must all have been taken; and if it is issued under any other circumstances than those under which the statute gives it, the officer issuing it will be a trespasser.⁴ The liability is *strictissimi juris*, and cannot be ex-

¹ *Mills, J.*, in *Commonwealth v. Rodes*, 5 T. B. Monr. 318, 324, citing, in support of his views, the action of the federal government in making transcripts from the books of the treasury evidence of delinquencies. For similar expressions, see *Waldron v. Lee*, 5 Pick. 323; *Smyth v. Titcomb*, 31 Me. 272. It was held in *Board of Justices v. Fennimore, Coxe* 242, that a committee of the county commissioners did not conclude the collector by their settlement with him, but he might show error on being sued for the balance. In Texas the controller's statement of accounts is not evidence in a suit against the collector: *Albright v. The Governor*, 25 Tex. 687. This would be the rule anywhere, in the absence of an express statute making it evidence. In Louisiana a certified

statement from the books of the auditor of the public accounts is *prima facie* evidence of the state of a collector's accounts with the auditor's office: *State v. Lake*, 45 La. An. 1207.

² *Prather v. Johnson*, 3 H. & J. 487; *Billingsley v. State*, 14 Md. 399.

³ The two remedies against a delinquent tax-collector by imprisonment on an extent, and by suit on his official bond, are elective and not concurrent: *Hartland v. Hackett*, 57 Vt. 92.

⁴ *Weimer v. Bunbury*, 30 Mich. 201. A town treasurer's extent against a collector for taxes is invalid if not preceded by an express demand for the taxes, or if it is far too large an amount, and then it is no justification for the collector's arrest; and such an extent must be strictly construed:

tended a single step beyond the statutory permission. The same remark may be made of the case of application for judgment on motion. The statute must be strictly pursued, as the ordinary legal intendments do not apply in aid of the proceedings in such a case.¹ But where the statute has been strictly pursued, the summary remedies have been sustained by the courts without hesitation. "The federal government," it is said by an able jurist of Georgia, "may summarily enforce the collection of its revenue out of defaulting receivers or other duly appointed agents. Upon like principles the state may collect taxes immediately out of the defaulting citizen; for that purpose the tax-collector is authorized to issue execution. These powers of the government are founded in an imperious necessity. They are necessary to the preservation of the government, to the administration of the law, indeed to a maintenance of all the rights of the people. If the government were forced to submit the case of every defaulting taxpayer and tax-gatherer and financial agent to a jury, with the delays and uncertainties attending a judicial investigation, it could not command its revenue, it could not be administered."²

Ayer v. Goss (N. H.), 51 Atl. Rep. 253. An officer levying on an extent against a delinquent tax-collector is not required to make a return; and such return, if made, can be varied by parol evidence: Hackett v. Amsden, 57 Vt. 432.

¹ Nabors v. The Governor, 3 Stew. & Port. 15. And see Walker v. Chapman, 22 Ala. 116; Graham v. Reynolds, 45 Ala. 578; State v. McBride, 76 Ala. 51. As to the recitals in the record, see Hardaway v. The County Court, 5 Humph. 557. Where the statute authorizes summary judgment against the collector and his sureties, the collector is a necessary party, and if he is dead, the summary remedy is gone: Governor v. Powell, 23 Ala. 579. If the bond is taken to the county trustee when it should have been to the

governor, the summary remedy cannot be had: Mallory v. Miller, 2 Yerg. 113. And see Boughton v. State, 7 Humph. 190. So a bond dated fourteen months after the collection is *prima facie* not the statutory bond, and motion for judgment on it should be denied: De Soto County v. Dickson, 34 Miss. 150. But the fact that the penalty of the bond is smaller than the statute requires is no objection to it: Mabry v. Tarver, 1 Humph. 94.

² Lumpkin, J., in Tift v. Griffin, 5 Ga. 185, 191. The learned judge comments in this case upon the claim that the tax-collector was entitled to a trial by jury, and declares that the case is, and always has been, and must be, an exception to the right of jury trial. And see Waldron v. Lee, 5 Pick. 323; Smyth v. Titcomb, 31 Me.

The necessity for a strict compliance with the statute in the issue of such process is seen in the further fact that the officer who issues it is usually a mere ministerial officer, without judicial power. As has been said in a case from which quotation has already been made, and in which, by statute, an inferior court issued the process, "the inferior courts have judicial powers, but I apprehend that this is not one. They act as mere agents of the state. They are instructed by the act to issue execution for the amount which appears to be due. There is no issue to try; there is no judgment to be pronounced. As *auditors*, it is their business to ascertain the amount due, and then to issue execution. So the state treasurer is the mere agent of the state. His business is to state the collector's account, and, if he is in arrear, to issue execution."¹

Precisely the same reasons sustain those acts of the legislature which forbid the courts' interfering with the process which is issued in revenue cases. If it is important that the party in default should be precluded from a resort to dilatory proceedings of one kind, it is equally important that the power to interpose others should not be allowed to him.² Here again

272; *Bassett v. The Governor*, 11 Ga. 207; *Harper v. Commissioners*, 23 Ga. 566; *Daggett v. Everett*, 19 Me. 373; *School District v. Clark*, 33 Me. 482; *Cruikshanks v. Charleston*, 1 McCord 360; *Prather v. Johnson*, 3 H. & J. 487; *Billingsley v. State*, 14 Md. 369; *Hobson v. Commonwealth*, 1 Duv. 172; *Weimer v. Bunbury*, 30 Mich. 201.

¹ *Eve v. State*, 21 Ga. 50; *Scofield v. Perkerson*, 46 Ga. 350.

² *Tift v. Griffin*, 5 Ga. 185, 193. It is added that, if the duty were judicial, it would make no difference, because it is exceptional. The ordinary may issue execution against the collector and his sureties in a proper case, although he himself is a surety. And notice before issuing it need not be given the collector: *Walden v. Lee County*, 60 Ga. 296. An execution issued under the Georgia statute

by the comptroller-general against a defaulting collector is an execution for taxes under the state constitution, and is enforceable against property exempted for the family from ordinary final process: *Cahn v. Wright*, 66 Ga. 119; *Irby v. Livingston*, 81 Ga. 281. Such an execution may be issued against a defaulting collector for the amount of taxes collected by him after they have been credited to him as insolvent: *Wilson v. Wright*, 83 Ga. 38. For a discussion of statutory proceedings on behalf of the state against a defaulting collector and his bondsmen, see *Timberlake v. Brewer*, 59 Ala. 108. A warrant cannot be issued against a collector unless he is delinquent as to taxes so committed to him for collection that he could legally compel payment thereof. A liability for moneys

is a rule which seems severe, but the statutes which prescribe it do not go beyond those which have been sustained by the courts, in which is taken away the right to maintain replevin for property taken for taxes, or to take any other proceedings calculated to embarrass the collector's action. The legal view of such statutes is that, while they take away a specific remedy, they nevertheless leave to the party other remedies which are adequate to do him eventually full justice.¹

Even as regards the summary proceedings, however, there are some principles which will constitute protection to the collector and his sureties. One of these must be, that they can only be proceeded against on notice with a hearing on the question of delinquency. We say nothing here of the evidence which may be received on the hearing; of its quality or its conclusiveness; but the principle, that one is not to be condemned unheard, should be considered inviolable. The hearing will of course be summary, and a substituted notice might be sufficient, where, in proper cases, the law so provides. Another is, that there shall be some official showing of the delinquency; something of an authoritative character, and based upon documents, returns, or records which show the facts. It has been decided in one case that an officer who could have no better evidence of a collector's default than the legal presumption that another officer, whose business it was to deliver to the

voluntarily paid him cannot be thus enforced, and action will lie against the officer who issues a warrant to enforce it: *Pearson v. Canney*, 64 Me. 188. But in Maine a treasurer is not liable to a collector for issuing a warrant against him for failure to collect and pay over, if the assessors have given the treasurer a certificate that they have delivered to the collector a list and warrant in due form of law, notwithstanding such warrant was in fact legally insufficient: *Snow v. Winchell*, 74 Me. 408.

¹ It has been decided in Georgia that the governor may be author-

ized to vacate the commission of a defaulting tax-collector and fill the vacancy. "The running of the state machinery is so intimately connected with its treasury, and may be said to be so dependent upon it, and it is of such transcendent importance to its citizens and the public, that it cannot be subjected to the ordinary rules governing in other cases." *Trippe, J.*, in *State v. Frazier*, 48 Ga. 137. But the remedy by summary judgment for taxes collected cannot be had against one who has been ousted on *quo warranto* as a usurper: *Hartley v. State*, 3 Kelley 233, 237.

collector the proper tax-rolls and warrant, had performed that duty, could not be empowered to issue execution on such a presumption, since the like presumption would be equally strong in favor of the collector, and should consequently protect him.¹ It was also decided in the same case that any such summary process — at least where the statute had prescribed no form — should show on its face the existence of all the facts necessary to give jurisdiction to issue it.²

The conclusion to be drawn from the authorities appears to be, that the officer, by accepting the public trust, submits himself to the laws which provide remedies for the enforcement of his duties, with this restriction, that final process is not to be issued against him unless the officer issuing it has evidence that a default has occurred. And so far as the officer himself is concerned, as his obligation does not spring from contract, but comes from the law itself, he may perhaps be subjected to such change of remedies, or provision for new remedies, as may be made by changes in the statute after his appointment or election. But summary remedies cannot be given against sureties except as they have assented to them, either expressly by their bond, or by implication in giving the bond under a statute which provides for them. And changes in the statute law which, if applied to their contract, would subject them to further responsibility, or to other remedies unknown to the common law, could not be applied at all.

The same principle seems to apply here as to the remedy by

¹ *Weimer v. Bunbury*, 30 Mich. 201. In this case the court fully sustained the power to provide for this summary process, but held that a county treasurer, in whose office there was no evidence that the collector had ever had the tax-warrant, and no evidence of delinquency, except the mere fact that the time for making return of taxes collected and delinquent had expired, could not be authorized to issue execution against the collector. Compare *Commonwealth v. Wilson*, Myers (Ky.) 127.

² *Weimer v. Bunbury*, 30 Mich.

201, citing to the point that jurisdictional facts must appear, *Nichols v. Walker*, Cro. Car. 394; *Rex v. Manning*, 1 Burr. 377; *Rex v. Mayor, etc. of Liverpool*, 1 Burr. 2244; *Frery v. Dakin*, 7 Johns. 75; *Mills v. Martin*, 19 Johns. 7; *People v. Koeber*, 7 Hill 39; *Dakin v. Hudson*, 6 Cow. 221; *Bridge v. Ford*, 4 Mass. 642; *Cloutman v. Pike*, 7 N. H. 209; *Barrett v. Crane*, 16 Vt. 246; *Chandler v. Nash*, 5 Mich. 409; *Platt v. Stewart*, 10 Mich. 260; *Newsom v. Hart*, 14 Mich. 233.

suit against the collector; while he cannot be compelled to make an illegal collection, or be rendered liable for neglect to do so, yet, if he actually collects a tax, he cannot defeat the summary proceeding by showing that the tax was unauthorized.¹

¹ *Palmer v. Craddock, Myers* (Ky.) 182. An act authorizing the treasurer to issue execution against persons making default in listing their property for taxation was considered and sustained in *State v. Allen*, 2 McCord 55. But this seems to be going a great way. That a law for summary judgment

against the collector and his sureties is not unconstitutional, see *Worth v. Cox*, 89 N. C. 44, citing *Oates v. Darden*, 1 Murphy 500; and *Prairie v. Worth*, 78 N. C. 169. And see *State v. McBride*, 76 Ala. 51, that the judgment taken, though by default, is conclusive of the amount due.

CHAPTER XXIII.

ENFORCING OFFICIAL DUTY UNDER THE TAX LAWS.

Customary provisions. Under any system of taxation, most careful provisions are essential to insure obedience to the law on the part of those who are intrusted with its administration. The serious consequences that ensue when any important provision of law is overlooked or disregarded are sufficient to render such regulations prudent, and the perpetual temptations which invite officers to disobedience or evasion of the law must admonish the government of their necessity. It is to be borne in mind also that tax-laws, however necessary, do not enlist the affections of the people, and that the public sympathy is not unlikely to fail the officers when they most need it in the performance of their duties. In general, the people submit to taxation as a hard necessity; and as every individual is likely to be impressed with a conviction that the laws seldom or never operate with equality or justice, he is also likely to be entirely willing to make his case one that shall escape the heavy burdens. The tax official is therefore expected to enforce the law against a community, the members of which excuse to themselves an evasion of its provisions on the ground that even then they perform their duties as nearly as do the others upon whom the like duty rests; and will feel, if compulsory steps are taken against them, something like a sense of personal wrong. The difficulty is complicated by the fact that the officers who make the assessments are chosen by the people assessed, and as the local assessments are usually made the basis for state taxation, their constituents will expect them to make the valuations sufficiently low to protect them against unfair assessments elsewhere. The sense of official duty must be strong and the firmness considerable that can resist under such circumstances the pressure for some departure from the strict rule of law; and the conclusive evidence that it is not always resisted is found in the notorious fact that men who take solemn oath to perform to the best of their ability

the duty of assessing property at its fair cash value are accustomed to assess it at from one-fourth to two-fifths only, excusing their disobedience of the law on the general disobedience of others. The provision for a state equalization as a correction of this evil does not appear to cure this demoralizing disregard of law and official oaths, nor does any legal process seem adequate to the case.

Of the securities relied upon for the performance of duty by tax officials, besides those which may be found in the character of the officials themselves, or that may rest in the power of removal, the following may be mentioned:

1. *The official oath.* Upon this much less reliance is placed than formerly, for the reason, perhaps, that the community has come to tolerate — it may almost be said to demand — a disregard or evasion of its provisions, when the apparent interest of the district seems to require it. Moreover, as has been shown in another place, an official oath is not absolutely essential, and if neglected, the proceedings may still be valid. The oath is consequently of little or no importance, and probably might be abolished without detriment to the public service; certainly without detriment to the public morals.¹

2. *An official bond.* This is usually required of collectors only. The value of this depends on the law, on its terms and on the sureties, and there is no occasion to add here to what has been said in the last preceding chapter.

3. *Penalties for neglect of duty.* Of these great use is made. They are either penalties to be recovered in a civil action, or they are imposed as criminal punishments. For the cases of various officers connected with the public revenue system, particularly collectors, appraisers, and other officers or agents in the internal revenue and customs service of the United States,

¹ Sufficient evidence of this is furnished too often by the further fact that men appointed from the ranks of respectability to perform duties under the internal revenue and other tax laws are found in

very many cases to pay not the least regard to official obligations or official oaths, but to use the position as one of vantage for the purposes of public plunder.

it has been found necessary to go further, and to make some criminal misconducts and delinquencies punishable as felonies.

4. *Common-law remedies.* These lie back of those given by statute. The most useful and efficient of them all is that which is afforded by the writ of *mandamus*.

Mandamus: its nature. The writ of *mandamus* is a summary writ, issuing from the proper court, which commonly is the highest court of common-law jurisdiction of the state, commanding the officer or body to whom it is addressed to perform some specific duty, which the party applying for the writ is entitled of right to have performed.¹ The writ issues only when the party to whom it is directed is in default; it cannot confer upon him an authority to do an act which could not voluntarily have been done; but it is a mandate to compel the exercise of an authority which the respondent already possessed but which he has wrongfully refused or neglected to perform. It is therefore a complete answer to the application for the writ, in any case, that the respondent has no authority of law to do the act which the applicant would have performed;² or that some further act remains to be done to complete the applicant's right.³ The writ, therefore, cannot require an official act by one after he has gone out of office,⁴ nor by one who,

¹ 3 Bl. Com. 110; *State v. Police Jury*, 29 La. An. 146; *Marathon T'p v. Oregon T'p*, 8 Mich. 372; *Ex parte Nelson*, 1 Cow. 417; *Commonwealth v. Pittsburgh*, 34 Pa. St. 496. To the same effect, *Wilcox v. Hunter* (Va.), 25 S. E. Rep. 1000.

² *United States v. Clark County*, 95 U. S. 769; *Meriwether v. Garrett*, 102 U. S. 472; *Ex parte Rowland*, 104 U. S. 604; *United States v. Labette County*, 7 Fed. Rep. 318; *Railway Co. v. Olmstead*, 46 Iowa 316; *Rice v. Walker*, 44 Iowa 458; *People v. Board of Com'rs*, 176 Ill. 576; *State v. Fournet*, 30 La. An. 1103; *Saloy v. New Orleans*, 33 La. An. 79; *State v. Police Jury*, 34 La. An. 95; *Wilcox v. Hunter*

(Va.), 25 S. E. Rep. 1000. *Mandamus* will not lie to compel an officer to notify a board to lay a tax to pay state scrip which has been judicially declared void: *State v. Comptroller General*, 4 S. C. 185. See *Graham v. Parham*, 32 Ark. 676.

³ *State v. Herron*, 29 La. An. 848; *State v. Rice*, 35 Wis. 178.

⁴ *State v. Perrine*, 34 N. J. L. 254. Where proceedings have been begun against a board they may be continued against their successors: *Bassett v. Barbin*, 11 La. An. 672; *Boody v. Watson*, 64 N. H. 162. And see *State v. Police Jury*, 39 La. An. 979. But *mandamus* will not lie to the board of commissioners after the levy of the

though elected, has never qualified and entered upon the performance of his duties.¹ Nor can it issue in advance of the time for the performance of a duty, on any assumption that it will not be performed in due season.²

The writ not of right. Even when a *prima facie* case for the writ is made out, its award rests in the discretion of the court, which will allow or deny it according as in its opinion justice requires,³ and it is in general a sufficient reason for denying it that another adequate remedy exists.⁴ Thus, it has been refused when applied for to compel the board of supervisors to audit and allow to one wrongfully assessed the tax he had paid, he having, in that case, an adequate remedy by suit against the assessors who had assessed him without jurisdiction.⁵ It has

tax has been completed, the tax extended on the assessment roll, and the roll placed in the tax-collector's hands; the board being *functus officio*: Gaither v. Green, 40 La. An. 362. And the levy of a tax cannot be compelled after the time fixed by law for the levy has expired: Ellicott v. Levy Court, 1 Har. & J. 359. See State v. Taylor, 59 Md. 338. Nor can it be compelled by the surviving members of an extinct corporation, or by a new corporation not in privity with the one that is extinct: Barklee v. Levee Com'rs, 93 U. S. 258.

¹ State v. Beloit, 21 Wis. 280.

² School Com'rs v. County Com'rs, 20 Md. 449; State v. Burbank, 22 La. An. 298. A *mandamus* will not be issued to compel the spreading of a tax on the roll in advance of the time when it is to be done. On the contrary, it will be assumed that the officer will perform his duty when the time comes: Zanesville v. Richards, 5 Ohio St. 589, 593. Where the holder of ditch orders which are not paid because the taxes have been set aside, can have the taxes re-assessed, he will not be

entitled to an immediate levy on *mandamus*: Brownell v. Supervisors, 49 Mich. 414. When a tax has been paid and the marshal has transferred to the payer the tax-execution, *mandamus* will not lie at the suit of the land-owner to compel the marshal to re-transfer the execution upon receipt of the tax: Freeman v. Holcombe, 67 Ga. 337. The writ of *mandamus* cannot compel a board to meet and levy a tax at a time when it is not authorized by law to meet: Graham v. Parham, 32 Ark. 676. When the board of public instruction are to determine the amount of school taxes and the county commissioners to levy them, *mandamus* does not lie to compel the assessor to enter the school tax for collection until the proper determination is made: Jones v. Board of Pub. Inst., 17 Fla. 411.

³ Weber v. Zimmerman, 23 Md. 45; Ex parte Stickney, 40 Ala. 160; People v. Wayne Circuit Judge, 19 Mich. 296.

⁴ Supervisors v. Powell, 95 Va. 635.

⁵ State v. Miami County, 63 Ind. 497; Indianapolis v. McAvoy, 86

also been denied when asked for to compel the cashier of a national bank to pay taxes upon a stockholder's shares in the bank; the remedy by distress or by action against the bank being sufficient.¹ Where the statute affords an adequate remedy by *certiorari* it has been held that *mandamus* to strike from the rolls an illegal assessment will not lie.² The writ will not be granted to compel an assessor to assess for taxation property at its fair cash value instead of one-fourth of such value, where the county board of equalization has full power to equalize the assessment throughout the county.³ And where the relators have neglected to use their plain and adequate remedy by injunction to prevent the collection of an erroneous assessment, and have been guilty of great laches, a *mandamus* will not be issued to compel a re-apportionment though the cost was erroneously apportioned.⁴ But a provision for recovering by suit taxes paid under protest has been held not to be such an adequate remedy as would prevent the issue of *mandamus* to reduce an assessment of personalty, the valuation of which had been wrongfully increased by the county auditor.⁵

Discretionary authority. The writ is not awarded to control the exercise of a discretionary authority, and it is therefore usually said that a judicial duty cannot be enforced by means of it. Such a statement is not accurate; a judicial duty

Ind. 587. See *Byles v. Golden*, 52 Mich. 612; *Bay Supervisors v. Arenac Supervisors*, 111 Mich. 105; *People v. Chenango Supervisors*, 11 N. Y. 563. But where, by law, it is the auditor's duty in a proper case to draw a warrant for the repayment of a tax illegally collected, he may be compelled by *mandamus* to do so: *Henderson v. State*, 53 Ind. 60. But where the tax would have been the same, and where the assessment could have been corrected by the board of review if that tribunal had been applied to, the owner was held not entitled to a writ of *mandamus* to compel cancellation of tax-sales and the refunding of taxes because

his property had been taxed as realty instead of personalty as required by the statute: *MacKinnon v. Auditor-General* (Mich.), 90 N. W. Rep. 329.

¹ *Eyke v. Lange*, 90 Mich. 592, 100 Mich. 26.

² *People v. Board of Taxes*, 55 App. Div. (N. Y.) 544.

³ *State v. Osborn*, 60 Neb. 415. To a proceeding to compel an assessor to assess property at its true cash value, it is unnecessary to bring in any taxpayer of the taxing district as a necessary party: *Ibid.*

⁴ *Simpson v. Kansas City*, 52 Kan. 88.

⁵ *State v. Cromer*, 35 S. C. 213.

is as susceptible of being enforced by the process as any other when the right is clear, and when the judicial officer, if he obey the law, has no option, but must do some specific thing which the law requires of him. The more accurate statement would be, that while a judicial officer, or one exercising a judicial or discretionary authority, may be compelled to proceed in the performance of duty, he cannot be coerced in his judgment or compelled to exercise his discretion in a particular manner by means of this writ. But when a judge or other officer has no discretion as regards the particular act to be done, and a refusal to do some specific thing would be a wrongful denial of a right or a remedy, *mandamus* is a proper and suitable process to compel him to perform his duty.¹

It will not only lie, therefore, to compel an auditing board to proceed to the consideration of an account, and to pass upon it in some manner, but if the charges are legal, and it is the clear duty of the board under the statute to make the allowance, that duty the members may be compelled to perform by means of this writ.²

Case of assessments. In the application of these principles to cases in which assessments are complained of as excessive or relatively unfair, it is manifest that the scope for the employment of the writ is not extensive. Assessors exercise a *quasi* judicial authority, and when property is to be taxed by value, the value must be determined by their judgment. If they fail to proceed in the performance of duty, they may be

¹ See *Ex parte Burr*, 9 Wheat. 929; *Ex parte Bradstreet*, 7 Pet. 634; *Strafford v. Union Bank*, 17 How. 275; *People v. Board of Com'rs*, 176 Ill. 576. "Where a public officer or board is guilty of so gross an abuse of discretion or evasion as to amount to a virtual refusal to perform the act enjoined, or to act at all in contemplation of law, *mandamus* affords a remedy: *Illinois State Board v. People*, 123 Ill. 227; *People v. Board of Com'rs*, 176 Ill. 576. Where a board should hear an application for laying a tax, and

grant or refuse it so that the applicant may appeal or pursue some other remedy, the refusal to entertain the application is ground for *mandamus*: *Pfister v. State*, 82 Ind. 382.

² *Gunn v. Pulaski County*, 3 Ark. 427; *People v. Macomb Supervisors*, 3 Mich. 475; *Bright v. Chenango Supervisors*, 18 Johns. 242; *Hull v. Oneida Supervisors*, 19 Johns. 259; *People v. New York Supervisors*, 32 N. Y. 473; *People v. Otsego Supervisors*, 51 N. Y. 401.

compelled to act, but no court can decide for them what their judgment is or ought to be. These principles are not only applicable to the case of the assessors proper, but also to that of the appellate boards who review and revise their decisions, and they are well summed up by the supreme court of Massachusetts, in a case in which county commissioners had declined to abate a tax on behalf of one who claimed to have been over-rated. "If the commissioners," it is said, "had refused to hear and determine upon the complaint, this court would have issued a *mandamus* requiring them to do it. But the question whether the petitioner's taxes should be abated or not was a judicial question. And although it is within the province of this court to require the commissioners to decide the question, yet we have no power to decide it for them, or to determine what decision they shall make. No judicial officer, in determining a matter legally submitted to his discretion, can ever be required to be governed by the dictates of any judgment but his own. We are clearly of opinion that in refusing to abate the petitioner's taxes the commissioners acted judicially, upon a subject of which they had final jurisdiction, and in which the exercise of their discretion cannot be revised by any other tribunal."¹ Similar language has been made use of in Penn-

¹ *Gibbs v. County Com'rs*, 19 Pick. 298, citing *Chase v. Blackstone Canal Co.*, 10 Pick. 244, and *United States v. Lawrence*, 3 Dall. 42. See, also, *Clunie v. Siebe*, 112 Cal. 593; *Knight v. Thomas*, 93 Me. 494; *Sullivan v. Peckham*, 16 R. I. 525; *State v. Savage* (Neb.), 91 N. W. Rep. 716. Under the New Hampshire statute the assessors have original and exclusive jurisdiction to appraise the value of property for taxation, and the court cannot entertain a bill for *mandamus* to compel an increased valuation of property on the sole ground that the appraisal made is less than the true value: *Manchester v. Fernald* (N. H.), 51 Atl. Rep. 657. *Mandamus* will not lie to control the action of a board of

supervisors in equalizing assessments, unless the board's refusal to proceed according to law is established: *Attorney-General v. Supervisors*, 42 Mich. 72. *Mandamus* lies to compel the board of review to act on a taxpayer's complaint, though there has been no direct refusal to act, but an evasion by promises and by delivering the assessment-book to the board of review: *Loewenthal v. People*, 192 Ill. 222. Any private citizen in Minnesota may file an information for a writ of *mandamus* to compel an assessor to proceed with the assessment of property: *State v. Weld*, 39 Minn. 426; *State v. Archibald*, 43 Minn. 328. A *mandamus* to compel valuation for assessment was held not

sylvania in a case in which an inferior court had issued the writ to compel school directors to exonerate a person taxed. "This," it is said, "was an unprecedented application of the writ of *mandamus*. It is not the ordinary official duty of school directors to exonerate taxes, but rather to levy and collect them. If they were backward in the exercise of this official function, *mandamus* might be used to stir them up. But when they have set themselves in motion, and are proceeding to discharge the duty imposed by law, they are no longer subject to *mandamus*. Exoneration is a discretionary power incidental to their office, and in this instance would seem to have been exercised by a refusal to grant the relief asked for. We have no power to control a discretion vested in them, and no appeal lies from them to judicial tribunals."¹ This rule undoubtedly applies to all classes of assessments, and to all other actions of assessors which they are to perform according to the dictates of their own judgment. In New York, where a statute made it the duty of town assessors, when a majority of taxpayers owning more than one-half the taxable property of the town had signed a certain paper, to make affidavit of the fact for a certain purpose important to the town, a *mandamus* to compel them to perform the duty was held unauthorized. "The affidavit of the assessors must be in accordance with what they believe to be the fact, otherwise they incur the moral guilt of perjury, irrespective of any determination the court may have made thereon. By the seventeenth section of the act, false swearing by the assessors is made perjury, and, should it turn out that they are right, and the court wrong, in their views, the only ground upon which they could escape

to require the board to fix the valuation from the considerations suggested by the writ, but to leave the board free to exercise its functions: *Chicago Union T. Co. v. State Board*, 112 Fed. Rep. 607. Where the right to have an assessment made has been determined by adjudication, the common council will be compelled by *mandamus* to take action and exercise its legal discretion either to con-

firm the assessment or to spread upon the record its reasons for not doing so: *Cooper v. Springer* (N. J.); 52 Atl. Rep. 996. Further as to *mandamus* to compel assessment, see *Osborne v. Ludlow*, 78 Mich. 606; *Brown v. Nehmer* (Mich.), 87 N. W. Rep. 1035.

¹ *Woodward, J.*, in *Bedford School Directors v. Anderson*, 45 Pa. St. 388, 390.

conviction would be that the affidavit was not their voluntary act, but the result of coercion, which they had no power to resist. If this appeared upon the face of the affidavit, it is entirely clear that in no legal sense would it be their affidavit at all, but a mere nullity. It follows that there is no remedy provided by the act for the correction of errors into which the assessors may fall in respect to the matter referred to their determination. The statute having declared it to be their duty to make the affidavit when the fact exists, the court have power, by *mandamus*, to compel them to proceed and examine the evidence and determine the fact, and if, from their determination, it appears that the requisite consent had been given, to make an affidavit in accordance therewith. This is the universal rule in respect to all subordinate courts and tribunals clothed with the exercise of judgment or discretion. They may, by *mandamus*, be compelled to proceed and determine the matter, but cannot be compelled to decide in any particular way. If they could, it would no longer be their judgment or discretion, but that of the court awarding the writ. Their determination is conclusive, unless some mode of review is provided.”¹

Where, however, the judgment of the proper board has been exercised and the sum at which property should be assessed has been determined upon, and any further act remains to be done to complete the work of assessment, the proper officer or board to do the act may be compelled by this writ to perform his or its duty. If assessors, for example, should refuse to conform their action to that of the board of review — their duty to do so being purely ministerial — *mandamus* would be the only speedy and effectual remedy available to correct their

¹ Howland v. Eldredge, 43 N. Y. 457. *Mandamus* lies to compel a county auditor to make up his tax-lists in accordance with the equalized valuation by the board of supervisors,—to correct his placing relator's realty at the assessed, instead of the reduced, valuations: Ridley v. Dougherty, 77 Iowa 226. Where the county auditor has without authority changed the valuation on his tax-list from the

valuation as fixed by the board of assessors, he may be compelled by *mandamus* to restore the latter valuation: State v. Covington, 35 S. C. 245. And the writ will lie to compel him to correct a tax assessment which it was his plain ministerial duty to enter as of a certain smaller amount: State v. Cromer, 35 S. C. 213. But the writ will not lie to compel an assessor to assess street railway property

misconduct.¹ So the writ will lie to compel assessors to strike from the assessment roll non-taxable property which they have included in it. Here is a clear case of excess of jurisdiction; nothing is submitted to their discretion, because by the law the subject-matter of the controversy is put beyond their authority, and they can lawfully neither list it, nor value it.² It will lie also where property is assessed to the wrong person; both the public and the individual assessed being concerned in having the assessment so made that a legal and just tax can be levied upon it.³ It will lie to compel an assessor to assess lots separately as required by the statute;⁴ to compel the as-

in excess of its value upon the ground that it was greatly undervalued for the previous fiscal year by reason of the misrepresentations of the company's officers as to its value: *Clunie v. Siebe*, 112 Cal. 593. Nor will the writ lie to compel assessors to make oath that they have valued the property as required by law, when in fact they have not done so. "Courts do not sit to compel men to take false oaths, and whatever duty the assessors may have omitted, they owe no duty to the public to commit crime, and no public exigency can require it of them:" *Andrews, J.*, in *People v. Fowler*, 55 N. Y. 252, 254.

¹ *State v. Assessors*, 30 La. An. 261. See *People v. Ulster Supervisors*, 65 N. Y. 300, reversing 63 Barb. 83; *People v. Ontario Supervisors*, 85 N. Y. 323. It was held in *State Board of Equalization v. People*, 191 Ill. 528, that an assessment by the state board of equalization may be impeached and declared void and equivalent to no assessment where such assessment is so low as clearly to show it is fraudulent.

² *Baltimore County Com'rs v. Winand*, 77 Md. 522; *People v. Auditor-General*, 9 Mich. 134; *Peo-*

ple v. Otsego Supervisors, 51 N. Y. 401; *People v. Barton Assessors*, 44 Barb. 148; *People v. Olmsted*, 45 Barb. 644; *People v. New York City Tax Com'rs*, 41 Hun 373. Where a lot outside of an assessment district is included by mistake in an assessment for repaving, the error is clerical, and *mandamus* is the proper remedy of the owner of the land so included to compel correction: *People v. Wilson*, 119 N. Y. 515. On the general subject compare *Miltenerberger v. St. Louis County Court*, 50 Mo. 172. *Mandamus* will lie to compel supervisors to obey an order of court to correct an erroneous assessment, and to refund moneys collected upon it: *People v. Ulster Supervisors*, 65 N. Y. 300. It was held in *Baltimore County Com'rs v. Wineland*, 77 Md. 522, that as the county commissioners have power to add to the assessment personalty not returned by any assessor or collector, *mandamus* to strike such additional assessment from the books will not lie although such assessment was made without previous notice to the owner as required by law.

³ *Ames v. People*, 26 Colo. 83.

⁴ *Neu v. Voegel*, 96 Wis. 489.

sessment as town lots, and not as farming lands, of land which has been laid out into lots;¹ and to correct clerical errors in the assessment rolls while yet they are in the assessor's hands.² If assessors omit from the roll property which is taxable, they may be compelled to insert it on the roll on the application of the proper law officer of the state.³ So if some official act is required to be done before some portion of the taxable property can be assessed — such as a survey, or the determination of a township line — *mandamus* will lie to compel the performance of such act.⁴ The writ will also be granted on a contractor's relation to compel a city to make a new assessment

¹ State v. Herrald, 36 W. Va. 721.

² People v. Wilson, 7 N. Y. Supp. 627.

³ People v. Shearer, 30 Cal. 645; Ames v. People, 26 Colo. 83; State v. Board of Assessors, 52 La. An. 223; Knight v. Thomas, 93 Me. 494; Boody v. Watson, 64 N. H. 162. The case first cited was one in which promissory rights in the public lands were held to be taxable, and were ordered to be placed upon the roll. Possibly a private individual might have been relator in this case. See People v. Haley, 37 N. Y. 344, 53 Barb. 547. It was so held in Hyatt v. Allen, 54 Cal. 353, and Knight v. Thomas, 93 Me. 494. See, also, People v. Purviance, 12 Ill. App. 216. As to the requisites of a petition for a *mandamus* to compel the county clerk to extend taxes assessed by the assessor against personalty for years in which such property has been omitted from assessment, see People v. Sellars, 179 Ill. 170. *Mandamus* to compel assessors to assess omitted real estate will not be granted where it would not be effective—as where the assessment complained of has long since been made: Knight v. Thomas, 93 Me. 494.

⁴ See People v. Essex Supervisors, 85 N. Y. 612; Jones v. Board of Public Instruction, 17 Fla. 411; People v. Purviance, 12 Ill. App. 216; State v. Edgefield County Com'rs, 18 S. C. 597. The writ will lie to compel township officers to lay a drain assessment before the board of supervisors, unless the circumstances are clearly such that justice requires it should not issue: Laubach v. O'Meara, 107 Mich. 29. *Mandamus* is properly addressed to a city clerk to compel him to receive statements and extend tax: State v. Tracy, 94 Mo. 217. *Mandamus* issued to a supervisor to compel him to deliver to the board of supervisors the corrected assessment roll of his town, that the same with proper warrant may be delivered to the sheriff for collection: People v. Hardenburgh, 90 N. Y. 411. If a county clerk has delivered, in compliance with the statute, the assessment books to a *de facto* assessor claiming under color of a legal appointment, he cannot be compelled by *mandamus* to obtain the books, or to make new ones, and deliver them to one claiming to be the duly elected assessor. The appointment can-

where the original one was set aside for an amendable defect in the ordinance.¹

In all these cases there is a clear legal right of the public or of a private party to have performed a certain act which the officer refuses to perform; and it is immaterial what is the nature of the duty, if in the particular case the officer has no discretion. Such cases would stand in pointed contrast to one in which attempt should be made to control the judgment or discretion of assessors, or of the appellate board of review, after an appeal has been taken to it.² So the assessor, when he has a mere ministerial duty to perform, like that of the delivery to some other officer of a correct copy of the assessment roll, in a case where he has assumed to make unauthorized changes, may be compelled on this writ to perform it.³ And county commissioners, when they constitute the appellate tribunal for the hearing of complaints against assessments, may be compelled by this writ to proceed to the hearing, this being a right of the party which they have no discretion to deny.⁴

Political duties. Recurrence to the general principles already stated will make it plain that *mandamus* is not a proper remedy for a failure in the performance of political duties, or

not be questioned collaterally, and *mandamus* will not lie unless the right is clear: *People v. Lieb*, 85 Ill. 484.

¹ *People v. Pontiac*, 185 Ill. 337. The right to compel by *mandamus* officers of a levee district to assess and collect the taxes therein is barred by the six-year statute of limitations: *Woodruff v. State*, 77 Miss. 68. In a suit by a warrant-holder for a mandate to compel a reassessment the city was held estopped from denying the invalidity of an assessment for benefits: *Phillips v. Olympia*, 21 Wash. 153.

² *Gibbs v. County Com'rs*, 19 Pick. 298. See *Miltenberger v. St. Louis County Court*, 50 Mo. 172. But if the record of a board of

equalization shows inferentially that it heard evidence when in fact it did not, *mandamus* will issue to compel the correction of the record so that the fact shall appear therefrom: *State v. Dodge County Board*, 20 Neb. 595.

³ *People v. Ashbury*, 44 Cal. 616.

⁴ *Beidler v. Kochersperger*, 171 Ill. 563; *Kochersperger v. Larned*, 172 Ill. 86; *New Haven Clock Co. v. Kochersperger*, 175 Ill. 383; *Kinley Manuf. Co. v. Kochersperger*, 174 Ill. 379. This seems to be recognized in *James v. Bucks County*, 13 Pa. St. 72, where, however, the party had deprived himself of the right to be heard. And see *Virginia, etc. Co. v. County Com'rs*, 5 Nev. 341.

for errors, intentional or otherwise, in their performance. Such duties are always confided to the political sense and political judgment of the people or their representatives, and their reasons for any particular action or failure to take action cannot in general be inquired into. If, therefore, the people of a township, or the proper board having the power, shall fail to vote such taxes as seem to be needful, the courts cannot interfere by *mandamus*. If they could do so, it would be the courts, and not the people, who in effect would exercise the local political authority.¹

To this general rule, however, there are some very important exceptions. The power of the people to vote local taxes, it has already been seen, is not independent and absolute. They are restrained within certain bounds, and on the other hand they are compelled to act in some cases and to make levies, however unwilling they may be to do so. The most common case is, where a tax for some general purpose is required, and a municipality neglects or refuses to levy the portion assigned to it by law. Here the local political community has no discretion, and its officers may be compelled by *mandamus* to obey the law.² This remedy, therefore, may be had to compel a board of supervisors to assess upon the county the amount due from

¹ See *Union County Court v. Robinson*, 27 Ark. 116; *Sinking Fund Com'rs v. Grainger*, 98 Ky. 319; *Board of Education v. Covington General Council*, 103 Ky. 634. In the case first cited the endeavor was made to compel school district authorities to increase the school levy which the people had voted for the year, on a showing that it was insufficient for the support of proper schools. In the case from 103 Ky. 634, the court said it would not compel the city council to levy for the board of education a tax at a certain rate unless the council perversely refused to fix such rate as would raise the necessary amount.

² *People v. Jackson Supervisors*, 24 Mich. 237. *Mandamus* will not

lie against a county court to compel the levy of a tax, but must be directed to the individual officers entrusted with the performance of that duty: *Montgomery County v. Menifee County Ct.*, 93 Ky. 33. A taxpayer may intervene and plead a defense to a proceeding to compel a tax-levy, when the supervisors refuse to set it up: *Richards v. Lyon County Supervisors*, 69 Iowa 612. An award of a *mandamus* to a board of supervisors to meet and levy a tax on the taxable property of a county to build bridges will be satisfied by a levy at the board's first regular meeting after the service of the writ: *State v. Pierce County*, 71 Wis. 321.

it to the state, after it has been adjusted and settled by the competent authority; and to compel a township to levy a tax as required by law to make good to the county a loss sustained by the default of the township treasurer.¹

The remedy is equally available where the officers of a municipality wrongfully neglect or refuse to levy a tax for the satisfaction of some demand already established and settled, and for which the law requires a tax to be laid.² In such cases

¹ Hart v. Oceana County, 44 Mich. 417; Veghte v. Bernards, 42 N. J. L. 338. *Mandamus* will lie to compel the supervisor to extend school-tax according to the estimate furnished him by district directors, though the county court (without authority) has forbidden it: State v. Byers, 67 Mo. 706. A peremptory *mandamus* will not be issued to a board of county commissioners to levy taxes on the taxable property situated within a school district to pay interest, etc., on the school district's bonds, unless the right is clear and the school district has had an opportunity to be heard: Canatt v. County Com'rs, 39 Kan. 505.

² See Shelley v. St. Charles Co., 30 Fed. Rep. 603; Robinson v. Butte Supervisors, 43 Cal. 353; Manor v. McCall, 5 Ga. 522; Justices v. Paris, W. & K. R. T. Co., 11 B. Mon. 154; Anderson County Court v. Stone, 18 B. Mon. 852; Spencer County Court v. Commonwealth, 84 Ky. 36; Fleming v. Dyer (Ky.), 47 S. W. Rep. 444; School Com'rs v. County Com'rs, 20 Md. 449; Whitely v. Lansing, 27 Mich. 131; Beaman v. Board of Police, 42 Miss. 237; Sheridan v. Fleming, 93 Mo. 321; State v. Cather, 22 Neb. 792; State v. Railway, 49 N. J. L. 384; Ex parte Albany Common Council, 3 Cow. 358. Where a tax has already

been levied by one authority *mandamus* will not issue to compel the levy of it by another authority, though there is question which is the proper authority to make the levy: Board of Education v. Common Council, 128 Cal. 369. The court will not issue a *mandamus* to compel a school board to make a levy for the payment of orders issued in violation of a constitutional provision: Dempsey v. Board of Education, 40 W. Va. 99. The writ will not be granted to compel the assessment by a township of a tax to pay the uncollected part of a former assessment ordered to pay the amount then due on its bonds, until after the sale for delinquent taxes of the land whereon the former assessment was made: Wayne County Savings Bank v. Roscommon T'p Supervisor, 97 Mich. 630. Under a statute authorizing cities to issue bonds for internal improvements, and directing an annual tax levy to meet interest thereon, a city which each year levied a tax sufficient by computation to meet this interest on water-works bonds, cannot be compelled by *mandamus* to make an additional levy to meet arrears due to unpaid taxes: Gay v. New Whatcom (Wash.), 67 Pac. Rep. 88. Where, in certain years, a town had omitted to levy the special tax provided by statute to pay

the remedy may be had on behalf of the state or the municipality concerned, or by any individual whose demand the tax should pay. Thus, if one has recovered a judgment against a municipality which can only be paid by means of taxation, the levy of a tax to pay it may in proper cases be compelled.¹ It

the town's bonds, which omissions were acquiesced in by the bondholders, the latter were held not entitled to have such omissions made good by *mandamus*: *United States v. Cicero*, 41 Fed. Rep. 83. Right to *mandamus* precluded by acquiescence or agreement: *United States v. Cicero*, 41 Fed. Rep. 83; *Huntington County v. State*, 109 Ind. 596. Attachment for contempt for disobedience of *mandamus* to levy tax, see *President v. Elizabeth*, 40 Fed. Rep. 799.

¹ *Knox County v. Aspinwall*, 24 How. 376; *Supervisors v. United States*, 4 Wall. 435; *Von Hoffman v. Quincy*, 4 Wall. 535; *Galena v. Amy*, 5 Wall. 705; *Walkley v. Muscatine*, 6 Wall. 481; *Riggs v. Johnson County*, 6 Wall. 166; *Weber v. Lee County*, 6 Wall. 210; *United States v. Keokuk*, 6 Wall. 514; *Benbow v. Iowa City*, 7 Wall. 313; *Mayor, etc. v. Lord*, 9 Wall. 409; *Supervisors v. Durant*, 9 Wall. 415; *United States v. New Orleans*, 98 U. S. 381; *Wolff v. New Orleans*, 103 U. S. 358; *East St. Louis v. United States*, 120 U. S. 600; *United States v. County Court*, 122 U. S. 306; *United States v. Vernon County*, 3 Dill. 281; *United States v. Jefferson County*, 5 Dill. 310; *Clews v. Lee County*, 2 Woods 474; *Smith v. Tallapoosa Com'rs*, 2 Woods 596; *United States v. New Orleans*, 17 Fed. Rep. 483; *Devereaux v. Brownsville*, 29 Fed. Rep. 742; *Marion County v. Coler*, 75 Fed. Rep. 352; *Frank v. San Fran-*

cisco County, 21 Cal. 668; *State v. County Com'rs*, 19 Fla. 17; *State v. Jacksonville*, 22 Fla. 21; *Olney v. Harvey*, 50 Ill. 453; *East St. Louis v. United States*, 124 Ill. 665; *Huntington v. Smith*, 25 Ind. 486; *Coy v. Lyons City*, 17 Iowa 1; *Boynton v. Newton*, 34 Iowa 510; *Phelps v. Lodge*, 60 Kan. 122; *Sinking Fund Com'rs v. Grainger*, 98 Ky. 319; *Muhlenberg County v. Morehead (Ky.)*, 46 S. W. Rep. 691; *Whitely v. Lansing*, 27 Mich. 131; *Flagg v. Palmyra*, 33 Mo. 440; *State v. Hugg*, 44 Mo. 116; *Gooch v. Gregory*, 65 N. C. 142; *Lutterloh v. Com'rs*, 65 N. C. 403; *Gorgas v. Blackburn*, 14 Ohio 252; *Commonwealth v. Allegheny County*, 37 Pa. St. 277, 290; *Sandmeyer v. Harris*, 7 Tex. Civ. App. 515; *Fisher v. Charleston*, 17 W. Va. 595; *State v. Madison*, 15 Wis. 30; *State v. Beloit*, 20 Wis. 79; *State v. Milwaukee*, 20 Wis. 87; *Watertown v. Cady*, 20 Wis. 501; *State v. Racine*, 22 Wis. 258; *Hasbrouck v. Milwaukee*, 25 Wis. 122. The writ may be issued in Missouri by any court having jurisdiction to compel payment of the judgment: *State v. Rainey*, 24 Mo. 229. Any citizen may be relator to compel payment: *Decatur County Board v. State*, 86 Ind. 8; *State v. Fyler*, 48 Conn. 145. In Florida demand must first be made upon the proper authorities to levy the tax: *State v. Jacksonville*, 22 Fla. 21. But it seems not to be necessary in Missouri to show this: *State v. Slavens*, 75

is customary to make express provision by statute for such cases, and when the statute requires the levy of a tax the case is clear. When the statute does not expressly require it, the duty may perhaps be equally plain if the municipality has been clothed with the requisite power; for in contracting a debt a municipality impliedly contracts with the creditor that the taxing powers conferred upon it by the state shall be employed for the satisfaction of the obligation.¹ And the powers it had

Mo. 508. It is no defense that the bonds upon which the judgment was rendered had previously been adjudged invalid: *Hill v. Scotland County Court*, 32 Fed. Rep. 716. And where *mandamus* is sought to levy a tax to pay judgments rendered on county warrants, defenses predicated on the invalidity of such warrants are not available: *Board of Com'rs v. Burfee*, 24 Colo. 57. As to the issue of the writ where the city against which the judgments were rendered has been abolished, and a "taxing district" substituted: *Devereaux v. Brownsville*, 29 Fed. Rep. 742. An injunction against levying on public property does not bar an application for a *mandamus* by the creditor to compel the levy of a special tax to pay the municipal debt: *Brunswick v. Dure*, 59 Ga. 803. *Mandamus* will lie to compel a city to levy a tax to pay a judgment, though it has been enjoined from doing so in a suit to which the judgment creditor was not a party: *Smith v. Tallapoosa County*, 2 Woods 596. A judgment creditor of a county to whom the statute gives the right to require the county to make an annual levy of five per cent. to pay current expenses and debts, but who makes no objection to repeated smaller levies, is not entitled, after the lapse of several years, to a *mandamus* to compel a levy

sufficient to make up the deficiency: *Morton v. Kirk*, 79 Fed. Rep. 290. It is not error of which the respondent can complain that the tax ordered is to be distributed through several years: *Palmer v. Jones*, 49 Iowa 405. And if to levy all the tax in one year would be oppressive the amount may be apportioned, to be collected in successive years: *Phelps v. Lodge*, 60 Kan. 122; *State v. School District*, 22 Neb. 700.

¹ *Von Hoffman v. Quincy*, 4 Wall. 535; *Riggs v. Johnson Co.*, 6 Wall. 166; *United States v. New Orleans*, 98 U. S. 381; *Galena v. Amy*, 5 Wall. 705; *Loan Assoc. v. Topeka*, 20 Wall. 655; *Rees v. Wattertown*, 19 Wall. 117; *United States v. Macon County*, 99 U. S. 582; *Wolff v. New Orleans*, 103 U. S. 358; *Ralls County Court v. United States*, 105 U. S. 733; *State v. Police Jury*, 34 La. An. 673; *Sibley v. Mobile*, 3 Woods 535. This principle does not apply where other means than taxation are provided for meeting the obligation: *Water Commissioners v. East Saginaw*, 33 Mich. 164; *United States v. New Orleans*, 2 Woods 230; *Board of Com'rs v. King*, 67 Fed. Rep. 202. In South Carolina the principle is doubted. *Mandamus* was applied for to compel the levy of a tax to pay a judgment recovered against a town to which, by charter, no ex-

when the debt was created cannot subsequently be lessened or hampered to the prejudice of the creditor.¹ And it may be added that no subsequent change in the municipal boundaries, or in its organization or powers, short of its entire destruction, will affect the right of creditors to proceed against it or against its officers in any of the customary methods.² Nor is it indispensably necessary in all cases that judgment should have been recovered, in order that the duty to levy a tax may be imperative. If the amount of the demand is absolutely fixed and determined as it would be by judgment, and the law makes it the duty of the proper officers to levy a tax for its payment as a settled demand, this is sufficient, and *mandamus* may issue if

press power to tax was given. "Such power," say the court, "can only be implied on the ground of necessary implication. To raise such an implication it would be necessary to hold that municipal powers cannot be effectively granted without the taxing power—a proposition that we cannot affirm; no such power of taxation can therefore be implied." The writ was denied: *State v. Maysville*, 12 S. C. 76.

¹ See *ante*, pp. 121, 585. Also *Deere v. Rio Grande County*, 33 Fed. Rep. 823; *Brodie v. McCabe*, 33 Ark. 690; *Lilly v. Taylor*, 88 N. C. 489; *Goodale v. Fennell*, 27 Ohio St. 426.

² The holder of city bonds obtained judgment upon them against the municipality which, under a new title and with different powers of taxation, has succeeded to the city. *Held*, that he might by *mandamus* compel the new body to levy a tax for the payment of his judgment: *United States v. Port of Mobile*, 4 Woods 536. When a special tax is authorized for a particular demand, and it is inadequate to the pur-

pose, payment from the general fund may be compelled: *United States v. Clark County*, 95 U. S. 769; *Knox County Court v. United States*, 109 U. S. 229. See *Foote v. Howard Co. Court*, 4 McCrary 218. Where an appropriation to pay the amount of a tax voted by a township has been made, not exceeding the legal percentage of taxation for such purpose, the appropriation is a binding obligation from which the town is not discharged by such subsequent decrease in its taxable property that a levy does not produce the amount voted, and a further tax, not exceeding the statutory limitation, may be compelled: *Decatur County Board v. State*, 86 Ind. 8. See *Robinson v. Butte Co.*, 43 Cal. 353. *Mandamus* held to lie to compel the levy of a special tax where an effectual method of enforcing payment, which existed when the contract was made, had been taken away: *State v. New Orleans*, 34 La. An. 1149. That confederating to prevent the collection of a tax to pay a judgment may be actionable, see *Findlay v. McAllister*, 113 U. S. 104.

performance of the duty is neglected or refused.¹ Indeed, it has been held in the case of bounty bonds, which by the law under which they were issued were "a valid and lawful claim against the township," to "be paid in the same manner as the ordinary township expenses" are paid, that is to say, by the levy of a tax by the township officers, an action upon the bonds would not lie; *mandamus* being the appropriate and also the adequate remedy.²

¹ *East St. Louis v. Zebbley*, 110 U. S. 321; *United States v. Sterling*, 2 Biss. 409; *United States v. School District*, 20 Fed. Rep. 294; *Tarver v. Commissioners*, 17 Ala. 527; *Robinson v. Butte Supervisors*, 43 Cal. 353; *Columbia County v. King*, 13 Fla. 451; *Wilkinson v. Cheatham*, 43 Ga. 258; *Gardner v. Haney*, 86 Ind. 17; *Clark County Court v. Turnpike Co.*, 11 B. Mon. 143; *Rodman v. Larue Justices*, 3 Bush 144; *State v. New Orleans*, 34 La. An. 477; *Roscommon v. Supervisors*, 40 Mich. 454; *People v. Columbia Supervisors*, 10 Wend. 363; *People v. Otsego Supervisors*, 51 N. Y. 401; *People v. Bennett*, 54 Barb. 480; *Pegram v. Commissioners*, 64 N. C. 577; *State v. Clinton County*, 6 Ohio St. 280; *Cass v. Dillon*, 16 Ohio St. 38; *State v. Harris*, 17 Ohio St. 608; *State v. Board of Education*, 27 Ohio St. 96; *Commonwealth v. Pittsburgh*, 34 Pa. St. 496; *Commonwealth v. Pittsburgh Councils*, 88 Pa. St. 66; *Schoolbred v. Charleston*, 2 Bay 63; *Morton v. Compt. Gen.*, 4 S. C. 430. *Mandamus* is the proper remedy to compel a city to level a special tax to pay ascertained water rentals due under valid—but repudiated—contract for water supply: *State v. Great Falls*, 19 Mont. 518. A city cannot have a *mandamus* against a county treasurer for a

share of the road taxes collected under a general law where there is no order from the county court taxing the city's share of the fund and ordering the treasurer to pay it over: *Oregon City v. Moore*, 30 Or. 215.

² *Robinson v. Butte County*, 43 Cal. 353; *State v. New Orleans*, 34 La. An. 477; *Dayton v. Rounds*, 27 Mich. 82. When the proper tax has been levied, so that it has become the duty of the treasurer to make payment on presentation of the obligations, it is not necessary for the holder to have an order from the county commissioners for the purpose, and, consequently, they will not be compelled to issue one: *State v. McCrillus*, 4 Kan. 250. The writ will not issue to compel the payment of that which is unsettled and in respect to which a trial may be had in the usual manner: *Loomis v. Rogers*, 53 Mich. 135; *Michigan Paving Co. v. Common Council*, 34 Mich. 201. See *School District v. School District*, 40 Mich. 551. When a contract provides for the payment of one party out of levies for certain years, but the municipality fails to pay, the creditor is entitled to *mandamus* to collect a tax sufficient to pay him according to the assessment roll of the year when the levy is made: *Nelson v. St. Martin's Parish*, 111 U. S. 716.

Manaamus will also lie to compel the levy of any tax the levy of which is by law imperative, even though it be for purely local purposes. The principle is that the law should be obeyed, and in a matter of public importance any citizen is concerned to compel obedience.¹

But *mandamus* will not lie to compel the levy of a tax in excess of the legal limitation;² for, as has been already stated, this writ does not confer power; it only compels, in proper cases, the exercise of existing power. And it will not be employed to compel the payment of judgments or other demands to an extent that would deprive the municipality of means for ordinary and necessary municipal purposes.³ Nor will it lie to

¹ See *State v. Fyler*, 48 Conn. 145; *Decatur County Board v. State*, 86 Ind. 8. *Mandamus* to compel levy of a fence tax: *State v. Edgefield Com'rs*, 18 S. C. 597. To compel a county tax for specified public purposes: *People v. New York*, 2 Keyes 288. Denied to compel payment of claims issued without authority: *Peck v. Supervisors*, 36 Mich. 377. Denied to compel levy of a tax separate from the regular taxes: *State v. Kennington*, 10 S. C. 299.

² *United States v. Macon County Court*, 99 U. S. 582; *Ralls County Court v. United States*, 105 U. S. 733; *East St. Louis v. Zebley*, 110 U. S. 321; *Sidney v. Mobile*, 3 Woods 535; *Cope v. Collins*, 37 Ark. 649; *Sparland v. Barnes*, 98 Ill. 595; *State v. Royse (Neb.)*, 91 N. W. Rep. 559; *Corbett v. Portland*, 31 Or. 407. See *Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 369, 399. As to what would be a levy in excess of legal authority, see a special case in *East St. Louis v. Zebley*, *supra*. If the constitution of a state limits a city's power to tax it cannot be exceeded to pay debts, but it will be compelled to go to the limit of the power, and the legislature has no

right to appropriate all the tax to one class of debts: *Sidney v. Mobile*, 3 Woods 535. A statute allowing a court to order a levy to pay a judgment may co-exist with one limiting the municipality in laying taxes to a certain rate, and not be controlled by it. See *Shields v. Chase*, 32 La. An. 409. Sufficiency of return to show limit of taxing power has been reached: *State v. Jacksonville*, 22 Fla. 21.

³ *East St. Louis v. Trustees*, 6 Ill. App. 130; *Cromartie v. Commissioners*, 87 N. C. 134. In a proceeding for a writ of *mandamus* to compel a city to pay a judgment the court has no power to control the discretion of the city authorities in making appropriations from the taxes collected for current municipal expenses, although it may compel the application of any surplus remaining after the payment of such expenses upon relator's judgment, rather than upon other debts previously contracted: *Cleveland v. United States*, 111 Fed. Rep. 341. See *United States v. New Orleans*, 31 Fed. Rep. 537; *Sherman v. Langham*, 92 Tex. 13. Under a statute authorizing a village to levy an unlimited tax for any authorized

compel a city to appropriate a part of its revenue already raised to pay demands not provided for in raising it, when all such revenue is already appropriated and the law forbids any diversion,¹ nor to compel the enforcement of a special assessment by a sale of property after the time limited for the purpose by the law under which the assessment was laid,² nor to require a second levy for the payment of a demand before proper proceedings have been had to enforce the full collection of the first levy;³ nor to require the levy of a tax otherwise

purpose, upon a vote of its electors, it is no defense to a *mandamus* to compel the application of a tax, levied as required by statute, to the payment of a judgment for interest on its indebtedness, that the village would be left without sufficient funds for ordinary municipal purposes: *Kent v. United States*, 113 Fed. Rep. 232. When a city was limited in taxing to one and one-half per cent. on the valuation, but the charter and general laws further provided that in case of return *nulla bona* after judgment against the city, *mandamus* might issue to levy, assess, and collect a special tax to pay the judgment, held that the former provision applied to ordinary taxation, and that in addition to it the collection of a further tax to pay a judgment might be enforced by *mandamus*: *Louisiana v. United States*, 103 U. S. 289. Where the statute authorizing a *mandamus* is repealed after the writ has issued, the court must nevertheless proceed to give redress on the writ: *Memphis v. United States*, 97 U. S. 293. And it has power to decide what objects shall be included in the levy of a tax under the writ: *Memphis v. Brown*, 97 U. S. 300. If it does not distinctly appear that the judgment is founded in contract, it will not

be enforced by *mandamus* as against a constitutional provision setting a limit to taxation: *Farrot v. East Baton Rouge*, 34 La. An. 491, citing and following earlier cases. Compare *State v. New Orleans*, 36 La. An. 687.

¹ *State v. New Orleans*, 34 La. An. 469. Compare *State v. New Orleans*, 34 La. An. 477. Where a warrant is expressly payable out of the taxes of specified past years, the owner cannot compel taxation now to pay a judgment rendered on such warrant: *State v. Police Jury*, 33 La. An. 1122. A judgment creditor of a city garnished property of the city, and pending an appeal in the matter applied for a *mandamus* to compel a tax levy to pay his judgment. *Held*, that the writ would not be granted as it did not appear that he had no other adequate remedy: *Hitchcock v. Galveston*, 4 Woods 308.

² *State v. Taylor*, 59 Md. 338. *Mandamus* will lie to compel the recorder of a village to proceed to advertise for sale lands specially assessed, even though he may think the assessment illegal, if it is not bad on its face: *Common Council v. Whitney*, 53 Mich. 158.

³ *Duperier v. Police Jury*, 31 La. An. 709; *Kline v. Ascension*, 28 La. An. 538; *Huey v. Police Jury*, 33 La. An. 1091.

than in the regular course of law.¹ And inasmuch as a proceeding by *mandamus* is in the nature of an execution,² the writ will not lie to compel the levying of taxes in satisfaction of a judgment where, because of the statute of limitations, an execution cannot issue upon such judgment.³

Legislative duties. *Mandamus* never lies to coerce the performance of legislative duties, either by the legislature of the state or by any inferior and subordinate body; not only because legislation is foreign to judicial duties, but also because, in its nature, legislative action is discretionary. But an inferior legislative body may doubtless be required by this writ to convene for the purposes of action when the law makes it a duty; and where ministerial action is required of a body which also exercises legislative functions, its performance may be compelled by *mandamus* on the like reasons as when the act is to be performed by an individual officer.⁴

Executive duties. The writ will not be awarded to the executive of the nation or state; such officers being an independent department of the government, as much so as the judiciary itself.⁵ But all other executive officers,⁶ as well as all ministerial and administrative officers, are subject to the writ where the duty to be performed is clear and imperative. The writ will therefore lie to a state officer to compel him to reject taxes which have been returned to him upon lands which were exempt from the levy.⁷ It will also lie to com-

¹ State v. Shreveport, 33 La. An. 1179. *Mandamus* will not issue to compel the levy of a tax to pay a judgment until the judgment is registered, when a statute requires registry as a condition precedent, although such statute passed after the making of the contract recovered upon. It affects the remedy only, not the right: State ex rel. Ranger v. New Orleans, 32 La. An. 493.

² Harshman v. Knox County, 122 U. S. 306, 318; Canute City v. Trader, 132 U. S. 211.

³ Stewart v. St. Clair County Court, 47 Fed. Rep. 482.

⁴ Many of the cases referred to under the head of political duties are cases involving and requiring legislative action.

⁵ There is some conflict on this point, but the weight of authority is as here stated. See the cases collected in Cooley's Const. Lim., 5th ed., 138, n.

⁶ Morton v. Compt. Gen., 4 S. C. 430; Houghton County v. Auditor-General, 36 Mich. 27.

⁷ People v. Auditor-General, 9 Mich. 134. The duty of the auditor-general to reject taxes, in this case, depended upon the date when the patents for the lands issued;

pel the state board of valuation, where the entire franchise of a corporation is taxable for city purposes, to refrain from apportioning the value fixed by it between the city and the taxing districts outside.¹ It will also lie to compel the proper officer to issue a distress warrant against a defaulting collector; though it is said that if it is manifest from an inspection of the proceedings that the collector has no authority to collect the tax, by reason of its illegality, or that the persons assessed, on being compelled to pay it, would have a remedy back for restitution, the court will not grant a process to enforce a collection that would be fruitless and oppressive.² But

a fact only to be brought to his knowledge by evidence, but which made the duty clear when it was proved. In that regard the case resembled *People v. Otsego Supervisors*, 51 N. Y. 401. *Mandamus* is the proper remedy to compel the auditor-general to issue a certificate of error against a tax-deed, and to determine the validity of his reasons for refusal: *Hubbard v. Auditor-General*, 120 Mich. 505.

¹ *Adams v. Stephens*, 88 Ky. 443; *Howes v. Walker*, 92 Ky. 258; *Board of Councilmen v. Stone* (Ky.), 58 S. W. Rep. 373.

² *Smyth v. Titcomb*, 31 Me. 272, 281, per *Howard*, J. See, also, *Waldron v. Lee*, 5 Pick. 323, which covers all the same ground. A ruling like this in principle was made in *People v. Halsey*, 53 Barb. 547; S. C. on appeal, 37 N. Y. 344. The case was one in which a county treasurer had assumed to question an assessment, as being unjust, and had refused to issue his warrant for the collection of the tax. The court held that he had no discretion in the premises, and ordered a *mandamus* to issue. It was decided in the same case that a private individual, having a common interest with the rest

of the community in the collection of the tax, might be relator in the proceeding. On this last point *Fullerton, J.*, in 37 N. Y. 344, 348, says: "Inasmuch as the people themselves are the plaintiffs in a proceeding by *mandamus*, it is not of vital importance who the relator should be, so long as he does not officiously intermeddle in a matter with which he has no concern. The office which a relator performs is merely the instituting a proceeding in the name of the people, and for the general benefit. The rule, therefore, as it is sometimes stated, that a relator in a writ of *mandamus* must show an individual right to the thing asked, must be taken to apply to cases where an individual interest alone is involved, and not to cases where the interest is common to the whole community. This is the rule adopted in many of the states: *Hamilton v. State*, 3 Ind. 452; *State v. County Judge*, 7 Iowa 186; *State v. Bailey*, 7 Iowa 390; *County of Pike v. State*, 11 Ill. 202. The rule is different in other states: *Heffner v. The Commonwealth*, 28 Pa. St. 108; *The People v. Regents of University*, 4 Mich. 98; *People v. Inspectors of State Prison*, 4 Mich. 187; Ar-

neither this writ nor any other will lie against a state officer when the proceeding will in effect be a suit against the state unless by law the state permits itself to be sued.¹

Ministerial duties in general. One who in good faith attends a public sale of property for delinquent taxes at the time named in the advertisement, and requests the treasurer to offer the delinquent property for sale, and demands the right to bid therefor, may by procedure in *mandamus* compel the treasurer to offer such property for sale.² The purchaser at a tax-sale may have *mandamus* to compel the delivery to him of the proper certificate as evidence of his purchase,³ or to enforce the delivery of a deed if he is entitled to it,⁴ or of a proper

berry v. Beaver, 6 Tex. 457; Zebulon Sanger v. Kennebec County, 25 Me. 291. But the practice which has so long prevailed here, though never, so far as I can discover, passed upon directly by the court of last resort, where the objection was raised, seems to be a reasonable and convenient one, and ought now to be considered as settled."

¹ Antoni v. Greenhow, 107 U. S. 769; Carter v. Greenhow, 114 U. S. 317; Marye v. Parsons, 114 U. S. 325. But a state auditor may be enjoined at the suit of an individual from the performance of merely ministerial duties: Chesapeake, etc. R. Co. v. Miller, 19 W. Va. 408.

² State v. Farney, 36 Neb. 537.

³ State v. Magill, 4 Kan. 415. See State v. Bowker, 4 Kan. 114. A writ of mandate will not issue to compel a tax-collector to issue a certificate and deed to a tax-sale purchaser where the petition fails to aver that the property was assessed, that any taxes were levied, or that the taxes were unpaid: Bosworth v. Webster, 64 Cal. 1.

⁴ State v. Bradshaw, 39 Fla. 137, citing Hull v. State, 29 Fla. 79; State v. Bradshaw, 35 Fla. 313; State v. Jordan, 36 Fla. 1, and State v. Lancaster, 46 S. C. 282. But not where the failure to obtain a deed was the purchaser's own fault or mistake: Klokke v. Stanley, 109 Ill. 192. Where the sheriff has made a sale and entered the purchaser's name in his book of sales, *mandamus* will be granted to compel him to make a deed, on his refusal to do so after the purchaser offers to comply with his bid, etc.; and this, though the sheriff, after the sale, and before such refusal, receives from the mortgagee the taxes due on the land: State v. Lancaster, 46 S. C. 282. That the writ will not issue where the petitioner is not entitled to a deed, see Aitcheson v. Huebner, 90 Mich. 643; Territory v. Perea (N. M.), 30 Pac. Rep. 928. The statute of limitation in respect to the right to compel the issue of a tax-deed runs from the time relator became entitled to the deed: Hintrager v. Traub, 69 Iowa 746; Palmer v. Palmer, 36 Mich. 487.

deed, if the one delivered to him is defective.¹ The owner, whose title has been cut off by a tax-sale, may have *mandamus* to compel the payment to him of any surplus moneys received on the sale.² And the writ is a proper remedy to compel the county auditor to permit the relator to redeem from a tax-sale, and to execute a certificate of redemption.³ It is no answer in any such case that the officer was to perform the duty in view of the facts made to appear to him, and that in his view the facts failed to make out a case for action; for if he is in error upon the facts, when he is not made the judge, his error cannot take away a right.⁴ But discretionary powers may be given by the law to any ministerial officer; and when they are, the rules already given must apply.⁵

Collectors and receivers of public moneys. *Mandamus* will lie to compel a collector to proceed in the collection of a tax even though there would be other remedy against him in case of his failure.⁶ Also to compel him to give the taxpayer credit

¹ Clippinger v. Fuller, 10 Kan. 377.

² People v. Hammond, 1 Doug. (Mich.) 276.

³ State v. Halden, 62 Minn. 246.

⁴ See Bryson v. Spaulding, 20 Kan. 427, where the officer was required to make a tax-deed conform to the facts, though the record was erroneous. See, also, Common Council v. Whitney, 53 Mich. 158.

⁵ See Houghton County v. Auditor-General, 36 Mich. 271, 41 Mich. 28. An officer will not be compelled to make a return that a tax-sale was in compliance with the law when the fact was otherwise: Hewell v. Lane, 53 Cal. 213. A township trustee has no discretion in the payment of an assessment for a ditch levied against the township, if properly made, and *mandamus* will be granted to compel payment: State v. Thompson, 109 Ind. 533. Under a statute requiring the auditor, before signing a street assessment warrant,¹ to

"examine the contract, the steps taken previous thereto, and the record of assessments, and must be satisfied that the proceedings have been legal and fair," *mandamus* will lie to compel him to countersign the warrant, there being no other remedy, and it being clear that the auditor's determination was not intended to be final: Wood v. Strother, 76 Cal. 545.

⁶ United States v. Buchanan County Court, 5 Dill. 285; United States v. Lafayette County Court, 5 Dill. 288; State v. Fyler, 48 Conn. 145; Woodruff v. State, 77 Miss. 68; State v. Whitworth, 8 Lea 594. *Mandamus* to compel the payment of a tax can only be prosecuted by a citizen and taxpayer: Garrison v. Laurens, 54 S. C. 449, 55 S. C. 551. The construction of a charter exempting inhabitants of a town from taxes will not be determined in a *mandamus* proceeding to compel the treasurer to collect such taxes:

for taxes paid,¹ and to receive the taxes without charge of interest when under the law no interest is payable.² Also to compel acceptance of the payment — where the statute permits such payment — by a tenant in common of the proportion which his undivided interest bears to the sum due for delinquent taxes, and to furnish the proper statement.³ Also to require the acceptance of county warrants in payment when the law requires it and they are tendered;⁴ and no action of the board to which he is in general responsible will excuse his disobedience to the requirements of law either in respect to the collection of moneys or to the disposition to be made of them after collection.⁵ It will also lie to compel a county treasurer to pay into the state treasury the state's proportion of the county levy,⁶ and to compel the refunding of moneys illegally collected of individuals where the law requires such refunding;⁷

Supervisors v. Powell, 95 Va. 635. The issue of a *mandamus* decreeing the collection of a tax that had been voted in aid of a certain railroad enterprise could not be defended by a police jury upon grounds which could only be asserted by taxpayers who had long since acquiesced in the election, as well as in its results: *Missouri, K. & T. T. Co. v. Smart*, 51 La. An. 443.

¹ *State v. Schnecko*, 11 Mo. App. 165; *Lobban v. State* (Wyo.), 64 Pac. Rep. 82. Where an illegal tax-sale has been made and the tax subsequently validated, the tax is to be considered unpaid, and the land-owner may have *mandamus* to compel the proper officer to receive and receipt it: *Clementi v. Jackson*, 92 N. Y. 591.

² *People v. O'Keefe*, 90 N. Y. 419. *Mandamus* will lie to compel a sheriff to receive taxes on land tendered by one having a lien thereon, and to issue a receipt therefor: *McNary v. Wrightman*, 32 Or. 573. It is also the proper remedy to compel the registrar of

arrears to receive the taxes and cancel a sale, where the relator had applied for all the bills for his taxes, and had received bills for certain years and paid them, but did not receive a bill for another year, so that his property was subsequently sold for taxes of that year; and the purchaser, not having received a deed, is not a necessary party: *People v. Registrar of Arrears*, 114 N. Y. 19. *Mandamus* will not lie to compel a county treasurer to certify that all taxes are paid when taxes remain unpaid, although the taxes are illegal: *State v. Nelson*, 41 Minn. 25.

³ *State v. Reed* (Wash.), 69 Pac. Rep. 1096.

⁴ *Daniel v. Askew*, 36 Ark. 487.

⁵ See *Jones v. Wright*, 34 Mich. 371.

⁶ *State v. Staley*, 38 Ohio St. 259.

⁷ *People v. Otsego Supervisors*, 51 N. Y. 401; *East Saginaw v. County Treasurer*, 44 Mich. 273; *George's Creek, etc. Co. v. Allegany County Com'rs*, 59 Md. 255.

and this in the case of taxes on exempt property, even though the exemption depends upon matters of fact which he is to inquire into and pass upon. The refunding in such a case is a mere ministerial duty; the officers are supposed to know the law, and it is their duty to apply it to the facts as they find them.¹ And if taxes after collection have been paid over to the wrong custodian, he may be compelled by *mandamus* to pay to the right.²

General remarks. The cases mentioned sufficiently indicate the general nature of those in which the writ of *mandamus* may afford the proper remedy. It will be seen that it is awarded as well on behalf of the public authorities, to compel performance of the successive official duties, under the revenue laws, as on behalf of private parties, whose rights have not been regarded in taxation or in any of the proceedings which are to result in taxation. On behalf of the state, the writ may issue against officers of corporations where a duty is imposed upon them under the tax-laws; such, for instance, as that of furnishing a list of the stockholders for assessment,³ or of pay-

See for special cases, *Madison County v. Smith*, 95 Ill. 328; *People v. East Saginaw*, 40 Mich. 336. In Louisiana *mandamus* will not lie to compel a collector to pay into the parish treasury moneys collected: *State v. Boullt*, 26 La. An. 259. The county treasurer's failure to pay over on demand to the owner of a special assessment certificate moneys collected, held to entitle the owner to a *mandamus* to enforce his rights: *State v. Hobe*, 106 Wis. 411. For a case of *mandamus* to compel payment by a collector to the county of a county tax, see *Sheridan v. Rahway*, 44 N. J. L. 587. *Mandamus* will not lie to compel a tax-collector to pay moneys to one whose term of office has expired: *Lee v. Taylor*, 107 Ga. 362.

¹ *People v. Otsego Supervisors*, 51 N. Y. 401. The case was one

of taxation of national securities, which, under the law and the decisions of the courts, were not within the jurisdiction of the assessors. It was made the duty of the supervisors to refund the tax, which they could only do on a showing of facts. The board adopted a resolution that the claim was invalid, and that it be disallowed, but this was a manifest evasion of duty.

² *State v. Treasurer*, 35 La. An. 1148; *Co-operative B. & L. Assoc. v. State*, 156 Ind. 463.

³ *Insurance Co. v. Baltimore*, 23 Md. 296, 309. *Mandamus* to officers of national bank to furnish list of stockholders not granted where statement required to be furnished to assessor gives all needful information: *Paul v. McGraw*, 3 Wash. 296. The writ may also be awarded to prevent a di-

ing over a tax on dividends which have been declared by the corporation.¹

Federal jurisdiction. The federal courts have no general power to issue the writ of *mandamus* to compel the performance of duties under the state tax-laws. That jurisdiction belongs to the province of state authority. The federal courts may, nevertheless, issue the writ in order to compel municipalities to levy taxes for the satisfaction of judgments which had been rendered in such courts, and which the local authorities neglected or refused to provide for by taxation, though clothed by law with full authority to do so. This is a power incident and necessary to their general jurisdiction,² and will only be exercised where judgment has been obtained.³ A suit for the purposes of the writ may, however, be brought in the federal court, though the state court would have had authority to compel payment of the demand without judgment.⁴ In some cases, under state laws, these courts have appointed commissioners to levy a tax when the local officers have refused to provide for it.⁵ But for this purpose the proper statutory authority must exist.⁶ If officers fail to comply with the command of the writ they will be punished as for contempt, and liable in dam-

version of funds held in trust by a municipal corporation: *Pike Co. v. State*, 11 Ill. 203.

¹ *McVeagh v. Chicago*, 49 Ill. 318; *State v. Mayhew*, 2 Gill 487; *Emory v. State*, 41 Md. 38; *Barney v. State*, 42 Md. 480. See *Person v. Warren R. Co.*, 32 N. J. L. 441, which was one of *mandamus* to the lessee of a road to compel the payment of a tax upon it. When the duty of paying a tax upon the capital stock of a corporation rests upon the president, it is no answer by the incumbent to a *mandamus* that he was not president when the taxes accrued: *Emory v. State*, 41 Md. 38.

² See *Knox County v. Aspinwall*, 24 How. 376, and other cases cited

in note 3, p. 1362; *Rees v. Watertown*, 19 Wall. 107, opinion by *Hunt, J.*; *Heine v. Levee Com'rs*, 19 Wall. 655, opinion by *Miller, J.*, and the opinion of Mr. Justice *Bradley*, in the case last named, in 1 Woods 246. Also *United States v. New Orleans*, 2 Woods 230; *Vance v. Little Rock*, 30 Ark. 435.

³ *Davenport v. Dodge County*, 105 U. S. 237.

⁴ *Davenport v. Dodge County*, 105 U. S. 237.

⁵ *Supervisors v. Rogers*, 7 Wall. 175, cited and explained in *Rees v. Watertown*, 19 Wall. 107, 117.

⁶ *Rees v. Watertown*, 19 Wall. 107, 117.

ages,¹ and it will be no excuse to them that a state court has undertaken to enjoin their action — the state courts being powerless to interfere.² It might be otherwise if the state jurisdiction had been submitted to.³

Equitable remedies. In some cases courts of equity will assist in the enforcement of official duties in tax matters. Thus, where a city had collected school taxes and penalties thereon, but had not paid over such collections, judgment creditors of the city's school board, whose claims were payable out of those taxes, were held to be entitled, if the school board failed to require it, to file a creditors' bill against the city for an accounting.⁴ A school district may sue to restrain a county clerk from taking from its tax-roll property properly belonging to it for taxation.⁵ And while *mandamus* will lie to enforce an assessment to create a fund out of which certain warrants are to be paid, a bill in equity will also lie to enforce and protect the rights of the parties.⁶ But as has already been shown, courts of equity have no power to levy or collect taxes;⁷ and

¹ See *Dow v. Humbert*, 91 U. S. 294; *Newark, etc. Inst. v. Panhorst*, 7 Biss. 99.

² *Riggs v. Johnson Co.*, 6 Wall. 166; *United States v. Keokuk*, 6 Wall. 514; *Mayor v. Lord*, 9 Wall. 409; *Clews v. Lee County*, 2 Woods 474; *Hawley v. Fairbanks*, 108 U. S. 543; *United States v. Silverman*, 4 Dill. 224.

³ See *Smith v. Tallapoosa Com'rs*, 2 Woods 596; *Hawley v. Fairbanks*, 108 U. S. 543. If funds are collected under judicial direction by duly authorized taxation, they cannot be appropriated to any other use than that for which they were raised, and a collector may be compelled by judicial orders to collect such taxes by sale of property or by suit or in any other way authorized by law, and to apply the proceeds on

judgments of the court: *Meriwether v. Garrett*, 102 U. S. 472.

⁴ *New Orleans v. Fisher*, 180 U. S. 185. As the collections were in trust, the statute of limitations constituted no defense: *Ibid.*

⁵ *School District v. Long*, 2 Okl. 460.

⁶ *German-American Savings Bank v. Spokane*, 16 Wash. 698.

⁷ See *ante*, pp. 47, 48, 830; *Grand Rapids School Furniture Co. v. School District Trustees*, 102 Ky. 556. Where the proper officers of a levee district have not assessed and collected the levee taxes imposed by the act creating the district, or have failed to sell the lands when delinquent, equity is without jurisdiction to have such taxes assessed and collected, the remedy being by *mandamus*: *Woodruff v. State*, 77 Miss. 68.

not even the fact that no one can be found to serve as collector will afford ground for equitable relief.¹

¹ Rees v. Watertown, 19 Wall. 107, 117; Thompson v. Allen County, 115 U. S. 558, 13 Fed. Rep. 97; McLean County Precinct v. Deposit Bank, 81 Ky. 254; Louisville Trust Co. v. Muhlenburg County (Ky.), 23 S. W. Rep. 674; Grand Rapids School Furniture Co. v. School District Trustees, 102 Ky. 556. And see Finnegan v. Fernandina, 15 Fla. 379.

CHAPTER XXIV.

THE REMEDIES FOR WRONGFUL ACTION IN TAX PROCEEDINGS.

Right to a remedy. In one of the early chapters of this work reference was made to the fundamental principle of constitutional right that no one shall be deprived of his property except by the law of the land, or, as it is sometimes expressed, by due process of law; and it was said that this principle was as much applicable in tax cases as in any others. It was also said, in substance, that however summary and apparently arbitrary may be the methods and processes in the levy and enforcement of taxes, they cannot deprive the citizen, when his property is taken by virtue or under pretense thereof, of a trial of the right to take it, before some impartial tribunal, to which the public authorities may justify their proceedings.¹ What the tribunal shall be, and what the proper remedy to seek in it, may be determined by either the common or the statute law; but from the one or the other, or from equity as an assistant to both, adequate redress for any actual wrong is supposed to be always attainable.

Wrongs in tax cases. The wrongs of which one may have occasion to complain in tax cases may arise from either of the following causes:

The contracting improperly or unlawfully of a debt which can only be paid through taxation.

The voting of a tax by the public authorities for an illegal purpose.

The voting of a tax for a purpose that may be legal, but in a way not allowed by law.

The levy of an excessive tax, whether the excess comes from a disregard of a constitutional or statutory limitation, or arises from the frauds or mistakes of officers.

The charging of the party in the assessment with subjects of

¹ *Ante*, pp. 51-82.

² *Webb v. Renfrew*, 7 Okl. 198.

taxation which are either exempt by law, or for other reason not assessable to him.

The taxing him in a district in which he is not taxable.

The laying upon him of an excessive or partial assessment, or imposing inadmissible costs or penalties.

The laying of the tax on some erroneous and inadmissible principle.¹

The failure to obey the law in the proceedings to the injury of the party's rights.

The sale or forfeiture of the party's property under circumstances rendering it illegal.

To treat of these separately would involve much repetition, and it will be more convenient to speak of wrongs in connection with the remedies appropriate to their redress.

Abatement of taxes. There are always methods in which one who is wrongfully assessed for taxation, or unequally taxed, may have abatement of the assessment or of the tax without resort to the customary legal remedies. While the assessor still has the list or roll in his hands uncompleted, he may abate any assessment on his own motion, or on application, when satisfied that it is either wholly or in part illegal or unjust. No statute could be necessary for this.² But when the assessment has passed from his hands, the right to an abatement must in general depend upon the statute. No doubt the legislature might abate taxes, and probably the legislative authority of a municipality might do the same as regards a municipal tax, where no legislative or constitutional provision was in the way; but taxing officers or boards must have special authority to warrant their doing so. In the absence of special authority, they are to accept the assessment as legal and just, and levy and collect the taxes accordingly.

The remedy usually given by statute is one for direct review either by the assessor himself, or in some form of appellate proceeding.

¹ Webb v. Renfrew, 7 Okl. 198.

² Cleveland, C., C. & St. L. R. Co. v. Backus, 133 Ind. 513; Pittsburgh, C., C. & St. L. R. Co. v. Backus, 133 Ind. 629. Where prop-

erty is destroyed by fire after the taxes are spread on the assessment roll the owner is not entitled to a rebate of the taxes: Case v. Detroit (Mich.), 88 N. W. Rep. 626.

Reviews and appeals. A review in some states is directed to be had before the assessor himself, with authority in that officer to abate the tax altogether if he finds the party unlawfully taxed, or taxed for property which is exempt or which he does not own,¹ or to reduce the assessment, when excess is complained of, if in the opinion of the officer the complaint is well founded.² Whatever may be the relief sought, the party ap-

¹ *State v. Ormsby County*, 7 Nev. 392. Where persons not taxable in a school district are assessed for a district tax their remedy is an application for an abatement: *School District v. Selectmen*, 63 N. H. 277, citing *Locke v. Pittsfield*, 63 N. H. 122, and *School District v. Carr*, 63 N. H. 201, 206. When a person is liable to taxation for personalty or realty in a particular district, his sole remedy for an excessive valuation, or for including in the assessment property of which he is not the owner, is by application to the assessors for an abatement: *Bourne v. Boston*, 2 Gray 494, 496, citing *Howe v. Boston*, 7 Cush. 273, and *Lincoln v. Worcester*, 8 Cush. 55. Compare *Lee v. Templeton*, 6 Gray 579. This doctrine applied to one properly assessed for realty in a town, but improperly assessed for other realty not in the town: *Salmond v. Hanover*, 13 Allen 119. Compare *Bailey v. Buell*, 50 N. Y. 662, reversing 59 Barb. 158. So, if property claimed to be exempt from taxation is assessed, and part is taxable, the owner's remedy is by application for abatement: *St. James Educ. Inst. v. Salem*, 153 Mass. 185; *All Saints Parish v. Brookline*, 178 Mass. 404. If one is taxed for the whole of certain property, when he is liable only for an undivided share, his remedy is by application for abatement. If he does not apply,

and is sued for the whole, he cannot then avoid paying the whole: *Davis v. Macy*, 124 Mass. 193. See *Westhampton v. Searle*, 127 Mass. 502; *Brigins v. Chandler*, 60 Miss. 862. So if a person is taxed on his own land and on another's, his sole remedy is by seeking an abatement: *Bates v. Sharon*, 175 Mass. 293. See *Kelley v. Barton*, 174 Mass. 396. Trustees properly assessed for one estate find their remedy in a petition for abatement if another estate is improperly assessed to them: *Richardson v. Boston*, 148 Mass. 508. That case was followed in *Norcross v. Milford*, 150 Mass. 237, where it was held that when property is improperly assessed for taxation the owner's sole remedy is by an application to the assessors for an abatement of the unjust assessment, and that he cannot maintain an action at law to recover taxes paid thereupon. And see *Schwarz v. Boston*, 151 Mass. 226. Successors of assessors who have levied a tax may abate it if application therefor is made within the proper time: *Hibbard v. Garfield*, 102 Mass. 72; *Carleton v. Asburnam*, 102 Mass. 348.

² *State v. Powers*, 24 N. J. L. 406; *Lewis v. State*, 59 Ohio St. 37; *Phillips v. Stevens Point*, 25 Wis. 594. Authority to abate taxes for over-valuation will not embrace a case where one complains that he is assessed for property he does

plying for it must comply strictly with the provisions of the statute which confers the right.¹ But the authority to review is more likely to be conferred upon some court or other appellate tribunal, which will either sit for the purpose of hearing complaints generally, or which will be empowered to hear such appeals as are brought to it in some mode which the statute prescribes.² And here, also, it is necessary that

not own: *Walker v. Cochran*, 8 N. H. 166. On a corporation's application for an abatement of taxes neither assessors nor county commissioners have authority to make a revaluation, but only to make an abatement, and a city cannot show that its assessors have valued and assessed some of the corporation's property at too small an amount. Moreover, the corporation can file an amendment limiting its complaint to certain specified lots, the effect being to waive objections to the assessment of all other property not specified: *Lowell v. County Com'rs*, 146 Mass. 403. A taxpayer's refusal to answer on oath necessary inquiries as to the nature and amount of his estate will not deprive him of his right to an abatement of the tax if he is aggrieved thereby: *Wright v. Lowell*, 166 Mass. 298. Omission in good faith to mention, in list brought in to the assessors, a piece of real estate of which they had a description on their books does not deprive one of the right to ask an abatement of the personalty tax: *Ibid.* That decedent's personalty was wrongfully taxed to heirs did not prevent administrator, to whom it was legally taxable, from petitioning for abatement of wrongful assessment: *Kent v. Exeter*, 68 N. H. 469. On a petition for abatement the fact that the land was assessed to one not the owner is

not ground for abating it if he is the owner's agent, and the petition is brought for the owner's benefit: *Fowler v. Springfield*, 64 N. H. 108.

¹ *Otis County v. Ware*, 8 Gray 509; *State v. Bishop*, 34 N. J. L. 45; *State v. Parker*, 34 N. J. L. 49; *State v. Horner*, 38 N. J. L. 212; *People v. Tax Com'rs*, 99 N. Y. 254. Under a statute providing that no person shall have an abatement of his taxes unless he has filed a list sworn to contain all his taxable property, a national bank, not its shareholders, is the one to petition for an abatement of taxes on shares of its stock belonging to shareholders of whom it has, as required, furnished a list: *National Bank v. New Bedford*, 155 Mass. 313. A debtor claiming a reduction of his tax on the ground of the state's holding a mortgage on his land must make his claim to the assessor under oath: *Conover v. Honce*, 46 N. J. L. 347. Failure to file inventory as ground for dismissing petition for abatement: *Parsons v. Durham*, 70 N. H. 44.

² A taxpayer who failed to file a complaint could not excuse the failure on the ground that no board of equalization was elected, where the statute provided that such a board should be chosen when the taxpayer complained if none had theretofore been elected: *Crecelius v. Louisville (Ky.)*, 49

the rule of strict conformity to statutory provisions be observed.¹

When the tax is illegal, one is not obliged to apply for an abatement, unless the statute makes that the sole remedy; but

S. W. Rep. 547. Where the statute provided that if the assessors refused to make an abatement to a person he might, within one month thereafter, make a complaint thereof to the county commissioners, it was held that refusal to make an abatement was not complete until notice of refusal was given, and that the person aggrieved was entitled to file his complaint within one month from such notice: *Lowell v. County Com'rs*, 146 Mass. 403. Where a county board and county auditor refused to abate taxes it was held to be the duty of the person assessed to apply to the state auditor to determine as to the proper place for listing and assessment: *State v. Willard*, 77 Minn. 190. If assessors increase too much the value of personalty, the taxpayer's remedy is to appear before the board of review at its annual meeting, and such board may fix the valuation: *Lawrence v. Janesville*, 46 Wis. 364. A statute providing that on appeal from an assessment made by a surveyor for repairing a ditch the only questions tried shall be the cost of repair and the amount to be assessed on appellant's land, does not preclude an issue's being raised as to the disqualification of the surveyor by reason of personal interest or relationship: *Markley v. Rudy*, 115 Md. 533. A county board has no authority to abate any but county taxes; it cannot, after judgment, vacate a forfeiture of lands to the state: *Madison County v. Smith*, 95 Ill.

328. A town meeting has no authority to remit any part of a person's assessment after the statutory tribunal has fixed it: *State v. Fyler*, 48 Conn. 145.

¹ See *Louisiana Brewing Co. v. Board of Assessors*, 41 La. An. 565; *Clarke v. Board of Com'rs*, 66 Minn. 304; *State v. Sadler*, 21 Nev. 13. If one has failed to make the statutory return and to appeal to the board of equalization he can have no remedy in the courts: *Price v. Kramer*, 4 Colo. 546. In Georgia the making return of its property is a condition precedent to a railroad company's right to contest the validity of a tax by means of an affidavit of illegality: *Macon, etc. R. Co. v. Goldsmith*, 62 Ga. 463; *Goldsmith v. Augusta, etc. R. Co.*, 62 Ga. 468; *Goldsmith v. Georgia R. Co.*, 62 Ga. 485; *Goldsmith v. Southwestern R. Co.*, 62 Ga. 495; *Goldsmith v. Central R. Co.*, 62 Ga. 509. For a like rule in Maine, see *Freedom v. County Com'rs*, 66 Me. 192; *Fairfield v. County Com'rs*, 66 Me. 385. If a taxpayer would avail himself of the statutory affidavit of illegality to resist an execution for taxes he must abide by the statute as to such remedy or abandon the remedy altogether; and where the statute makes such affidavit returnable to a particular court, it cannot be returned or transferred to any other court; *Georgia Midland & G. R. Co. v. State*, 89 Ga. 597. A corporation's right to appeal to the county commissioners on the refusal of the assessors to abate a tax is not lost by its having failed

he may contest the tax when attempt is made to collect it; or, under certain circumstances, may bring an action to recover back the tax when paid.¹ But for a merely excessive or unequal assessment, where no principle of law is violated in making it, and the complaint is of an error of judgment only, the sole remedy is an application for an abatement, either to the assessors or to such statutory board as has been provided for hearing it. The courts either of common law or of equity are powerless to give relief against the erroneous judgments of assessing bodies, except as they may be specially empowered by law to do so.² This principle is applicable to statutory

to render a sworn list as required by the statute: *Lowell v. Middlesex County Com'rs*, 146 Mass. 403. Under the New Hampshire statute providing that "any person aggrieved, having complied with the requirements of the law on the subject of exhibiting to the selectmen a true account of the polls and estate for which he is taxable, may apply by petition to the supreme court, within nine months after notice of the tax, for an abatement, and the court shall make such order thereon as justice requires," the right of appeal is not lost by non-compliance with the statutory requirements on the subject of exhibiting a true account, etc., when the petitioner was prevented from exhibiting an account by reason of accident, mistake, or misfortune, without fault on his part: *Trust & G. Co. v. Portsmouth*, 59 N. H. 33. In *Cochico Co. v. Strafford*, 51 N. H. 455, 470-472, it was held that although non-residents are not expressly excepted from the language of that part of the section which requires an exhibit of an account as a condition precedent to the right of appeal, yet, by fair construction of other statutes, an account not being required of non-

residents, they have the benefit of that section without an account. And see *Dewey v. Strafford*, 40 N. H. 203.

¹ *Powder River Cattle Co. v. Board of Com'rs*, 45 Fed. Rep. 323; *Board of Assessors v. Pullman's Palace Car Co. (C. C. A.)*, 60 Fed. Rep. 37, affirming 55 Fed. Rep. 206; *Keokuk & H. Bridge Co. v. People*, 161 Ill. 132, citing Illinois cases; *McGee v. Salem*, 149 Mass. 238; *Dexter v. Boston*, 176 Mass. 247; *Woodmere Cemetery Assoc. v. Springwells T'p (Mich.)*, 90 N. W. Rep. 277; *Hawkins v. Mangum*, 78 Miss. 97; *Hutchinson v. Omaha*, 52 Neb. 345; *New Jersey Zinc Co. v. Hancock*, 63 N. J. L. 506; *Bruecher v. Port Chester*, 101 N. Y. 240; *Grundy County v. Tennessee, etc. R. Co.*, 94 Tenn. 295; *Union & P. Bank v. Memphis (Tenn.)*, 64 S. W. Rep. 13; *Babcock v. Granville*, 44 Vt. 325. In Nebraska the remedy where taxes exceeding the constitutional limit are levied by the county is for the property owner to pay the tax under protest and to bring suit for the recovery of the unlawful excess: *Chicago, B. & Q. R. Co. v. Nemaha County*, 50 Neb. 393.

² *Beeson v. Johns*, 124 U. S. 56; *Ledoux v. La Bee*, 82 Fed. Rep.

boards of equalization, which are only assessing boards with certain appellate powers, but whose action, if they keep within

- 761; Wells, Fargo & Co.'s Express v. Crawford, 63 Ark. 576; Atlantic & P. R. Co. v. Yavapai County (Ariz.), 21 Pac. Rep. 768; Augusta v. Pearce, 79 Ga. 98; Humphreys v. Nelson, 115 Ill. 45; People v. Lots in Ashley, 122 Ill. 297; Buttenuth v. St. Louis Bridge Co., 123 Ill. 535; St. Louis Bridge Co. v. Tunnel R. Co., 127 Ill. 627; Keokuk & H. Bridge Co. v. People, 145 Ill. 596, 161 Ill. 132, 176 Ill. 267; Hulbert v. People, 189 Ill. 114; Gravel Road Co. v. Black, 32 Ind. 468; Cleveland, C., C. & St. L. R. Co. v. Backus, 133 Ind. 513; Pittsburgh, C., C. & St. L. R. Co. v. Backus, 133 Ind. 629; Smith v. Marshalltown, 86 Iowa 516; Crawford v. Polk County, 112 Iowa 118; Holton v. Bangor, 23 Me. 264; Gilpatrick v. Saco, 57 Me. 277; Rockland v. Rockland Water Co., 82 Me. 188; Williams v. Saginaw, 51 Mich. 120; Comstock v. Grand Rapids, 54 Mich. 641; Peninsular Iron, etc. Co. v. Crystal Falls, 60 Mich. 510; Michigan Savings Bank v. Detroit, 107 Mich. 246; Detroit Savings Bank v. Detroit, 114 Mich. 81; Aurora Iron Mining Co. v. Ironwood, 119 Mich. 325; Detroit Citizens' Street R. Co. v. Common Council, 125 Mich. 673; State v. West Duluth Land Co., 75 Minn. 456; Richardson v. Scott, 47 Miss. 236; State v. Neosho Bank, 120 Mo. 161; State v. Hoyt, 123 Mo. 348; State v. Hannibal & St. J. R. Co., 135 Mo. 618; Wenneker v. Cummings, 151 Mo. 49; Edes v. Boardman, 58 N. H. 580; Locke v. Pittsfield, 63 N. H. 122; Manchester v. Furnald (N. H.), 51 Atl. Rep. 657; Farmington v. Downing, 67 N. H. 441; State v. Segoine, 53 N. J. L. 339; State v. Stadler, 21 Nev. 13; Stafford v. Albany, 6 Johns. 1, 7 Johns. 541; Matter of Beekman St., 20 Johns. 269; Matter of Canal St., 11 Wend. 154; Matter of Mount Morris Square, 2 Hill 14; Matter of Canal, etc. Sts., 12 N. Y. 406; Swift v. Poughkeepsie, 37 N. Y. 511; Eager's Petition, 46 N. Y. 100; Western R. Co. v. Nolan, 48 N. Y. 513; Musser v. Adair, 55 Ohio St. 466; Webb v. Renfrew, 7 Okl. 198; Kimber v. Schuylkill Co., 20 Pa. St. 366; Hughes v. Kline, 30 Pa. St. 227; Wharton v. Birmingham, 37 Pa. St. 371; Clinton School District's Appeal, 56 Pa. St. 315; Stewart v. Maple, 70 Pa. St. 221; Everitt's Appeal, 71 Pa. St. 216; Moore v. Taylor, 147 Pa. St. 481; County Court v. Marr, 8 Humph. 634; Home Fire Ins. Co. v. Lynch, 19 Utah 189; Waterman v. Davis, 66 Vt. 83; Hewitt v. Traders' Bank, 18 Wash. 326; Chehalis Boom Co. v. Chehalis County, 24 Wash. 135; Templeton v. Pierce County, 25 Wash. 377; Green Bay & M. Canal Co. v. Outagamie County, 76 Wis. 587. See Stanley v. Albany Supervisors, 121 U. S. 535; McLeod v. Receveur, 34 U. S. App. 538; Alexandria, etc. Co. v. District of Columbia, 1 Mackey, 217; Weaver v. State, 39 Ala. 535; San Jose Gas Co. v. January, 57 Cal. 614; New Orleans v. Buckner, 28 La. An. 414; Frost v. New Orleans, 28 La. An. 417; Attorney-General v. Supervisors, 42 Mich. 72; Brock v. Shelton, 47 Miss. 243; Meyer v. Rosenblatt, 78 Mo. 495; Tripp v. Insurance Co., 12 R. I. 435; Allen v. Sharp, 2 Exch. 352. In New York city "the power to

their jurisdiction, is conclusive except as otherwise provided

set aside an assessment altogether and remit the record to the assessors has been conferred in one case only, and that is where it appears that the assessors, in making the assessment, have proceeded upon or adopted some erroneous principle." That the assessment is unequal and therefore unjust is "a question exclusively for the assessors, subject to review and correction by the board of revision. It would be manifestly impossible for the courts to entertain appeals for the purpose of adjusting questions in regard to the inequality of every local assessment:" In re Munn, 165 N. Y. 149. If the taxpayer fails to avail himself of the provisions of the law for his relief, after having been duly notified, he cannot complain of the errors of description and valuation after the assessment rolls have been definitely closed for examination and correction:" Red River & Coast Line v. Parker, 41 La. An. 1046, citing New Orleans v. Banking Co., 32 La. An. 157; Shattuck v. New Orleans, 39 La. An. 206, and State v. Meyer, 41 La. An. 436. The legislature in New Jersey has withheld from the supreme court the power to set aside assessments for any irregularity or defect in form, or for illegality in assessing or levying the same: State v. Love, 49 N. J. L. 235. One sued for taxes cannot defend on the ground that he is the mortgagee, not the owner, of the property taxed; the assessment of taxes against him for property not owned by him is merely an over-valuation, and his sole remedy, therefore, in the absence of fraud on the part of the

assessors, is by petition to them for abatement, with right of appeal to the commissioners: Bath v. Whitmore, 79 Me. 182. The remedy in Massachusetts of a person aggrieved by an assessment for benefits is by application to the superior court for a jury to reduce the assessment, and not by bill in equity or *certiorari*: Towne v. Newton City Council, 169 Mass. 240. Where part of the price of land has been paid with pension money, so that the land is to that extent exempt from taxation, the assessors act judicially in assessing the taxable part, and their determination cannot be attacked collaterally: In re Peek, 80 Hun 122, 30 N. Y. Supp. 59. Error in omitting from a street assessment one of the lots fronting on the street cannot be urged as a defense in an action on the assessment, the remedy being by appeal from the assessment: Buckman v. Landers, 111 Cal. 347. It was held in Boody v. Watson, 64 N. H. 162, that the judicial ascertainment of a statutory share of taxation, and process for its collection, might be necessary for the exercise of the corrective power vested in the higher court. In Louisiana Brewing Co. v. Board of Assessors, 41 La. An. 565, the provisions of the Louisiana constitution recognizing the taxpayers' right to test the correctness of their assessments before the courts of justice were held not unduly enlarged by the statutory requirement that a taxpayer, in asking reduction of an assessment, should, as a condition precedent to obtaining relief in the courts, appear before the assessors as a

by law,¹ although if fraud is charged there may be a remedy

board of reviewers. Where the statute requires an appeal only to attack the "valuation" of corporate stock, the corporation may, without appealing, defend an action for taxes levied against its stock by showing that the stock has not been issued, and was not, therefore, assessable: *Consumers' Ice Co. v. State*, 82 Md. 132. In *Whatecom County v. Fairhaven Land Co.*, 7 Wash. 101, it was held that in case of excessive valuation the taxpayer's remedy was not a proceeding before the board of equalization to correct the assessment, but that such valuation might be shown in proceedings in the superior court under the statutory order to show cause. It was decided in *Pacific County v. Ellis*, 12 Wash. 108, that an excessive valuation does not render the assessment absolutely void, but that the court may reduce it and give judgment for an amount found to be just.

¹ *Central Pac. R. Co. v. Placer County*, 43 Cal. 365; *People v. Ashbury*, 46 Cal. 523; *People v. San Francisco Supervisors*, 50 Cal. 228; *Farmers' & M. Bank v. Board of Equal.*, 97 Cal. 318; *Girvin v. Simon*, 116 Cal. 604; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Union Trust Co. v. Weber*, 96 Ill. 346; *East St. Louis Connecting R. Co. v. People*, 119 Ill. 182; *Illinois & St. L. R. & C. Co. v. Stookey*, 122 Ill. 358; *Coal Run Co. v. Finlen*, 124 Ill. 666; *Keokuk & H. Bridge Co. v. People*, 161 Ill. 514; *Rhoads v. Cushman*, 45 Ind. 85; *Cleveland, C., C. & St. L. R. Co. v. Backus*, 133 Ind. 513; *Ward v. Beale*, 91 Ky. 60; *Bath v. Whitmore*, 79 Me. 182; *McDonald v. Escanaba*, 62 Mich. 555; *State v.*

Hynes, 82 Minn. 34; *Yazoo & M. V. R. Co. v. Adams*, 77 Miss. 764; *National Bank v. Staats*, 155 Mo. 55; *Kittle v. Shervin*, 11 Neb. 65; *Dayton v. Multnomah County*, 34 Or. 239; *Carlisle School Dist. v. Hepburn*, 79 Pa. St. 159; *Moore v. Taylor*, 147 Pa. St. 481; *Tomlinson v. Board of Equal.*, 88 Tenn. 1; *International, etc. R. Co. v. Smith*, 54 Tex. 1; *Olympia Water Works v. Thurston County*, 14 Wash. 268; *Knapp v. King County*, 15 Wash. 541; *Buchanan v. Adams County*, 15 Wash. 699; *Baker v. King County*, 17 Wash. 622; *Noyes v. King County*, 18 Wash. 417; *McNamee v. Tacoma*, 24 Wash. 591. See *Webster v. Lincoln*, 50 Neb. 1; *Chapel v. Franklin County*, 58 Neb. 544. The mode of reasoning by which assessing boards have reached their conclusions is not reviewable by the courts: *Republic L. Ins. Co. v. Pollak*, 75 Ill. 292; *People v. Big Muddy Iron Co.*, 89 Ill. 116; *English v. People*, 96 Ill. 566; *New York & C. Grain & Stock Exchange v. Gleason*, 121 Ill. 502; *Traders' Ins. Co. v. Farwell*, 102 Ill. 413; *Clement v. People*, 177 Ill. 144. Under the statutes of Illinois the decision of the state board of equalization in fixing the value of railroad tracks is *quasi-judicial* in its nature, and can only be assailed for fraud or want of jurisdiction: *East St. Louis C. R. Co. v. People*, 119 Ill. 182; *St. Louis B. & T. R. Co. v. People*, 127 Ill. 627. The Massachusetts statute providing for a petition to the supreme court by a corporation aggrieved by a state tax, the assessment of which had been affirmed by the board of appeal, does not bring before the court an inquiry as to valuation,

in equity under principles to be stated hereafter.¹ And the

but whether there has been a wrongful assessment upon property not subject to taxation: *Boston Manuf. Co. v. Commonwealth*,

144 Mass. 598. The determination of assessors and the board of review as to the cash value of property assessed cannot be disturbed

¹ See *post*, p. 1456. Fraud being a conclusion of law, he who sets it up must state the facts relied on as constituting it, and a railroad company's mere written objections to the granting by the county court of a judgment for delinquent taxes on its "track" on the ground that the valuation as to more than half of the track was so grossly excessive and oppressive as to be fraudulent, does not suffice to authorize that court to act upon the question: *East St. Louis Connecting R. Co. v. People*, 119 Ill. 182. A fraudulent intent on the part of a board of equalization to value property at a higher rate than it is worth is not shown by proof that certain members of the board stated that they had raised the assessment on some property because it was necessary that there should be a high valuation in order to enable the city to meet its obligations: *Olympia v. Stevens*, 15 Wash. 601. That an assessment is excessive does not establish fraud: *Spring Valley Coal Co. v. People*, 157 Ill. 543, distinguishing *Hotel Co. v. Lieb*, 83 Ill. 602; *Keokuk & H. Bridge Co. v. People*, 161 Ill. 514. The fact that the property was assessed at \$414,484, while it was assessed at \$234,192 only, the year before, does not establish fraud: *St. Louis B. & T. R. Co. v. People*, 127 Ill. 627. That an officer of a railroad company declared before the board of assessors that the company would pay taxes upon a certain higher valuation of its

property, but would resist a higher valuation, does not impute fraudulent conduct to the board, although the board finally fixed the valuation at the rate the officer named: *Maish v. Arizona*, 164 U. S. 599. Under the Michigan statute a tax may be held illegal if the supervisor or board of review has acted fraudulently, but the fact of such fraudulent action must be clearly established to justify a court in so holding: *Pioneer Iron Co. v. Negaunee*, 116 Mich. 430. Where a city and its officers permit extravagant or fictitious items to be included in the cost of an improvement, this amounts to a fraud which under the New York statutes entitles a property-owner to have the assessment vacated or reduced: *In re Livingston*, 121 N. Y. 94. Under the Nevada statute relative to the board of equalization of taxes, and making the board's action final except in cases of fraud, fraud on the assessor's part is no ground for disturbing a valuation where no fraud on the board's part in confirming the valuation is alleged: *State v. Central Pac. R. Co.*, 21 Nev. 172. An owner who has appealed to the town and county boards, and obtained from them a reduction of the assessment made by the assessor, cannot, on the application for judgment for delinquent taxes, complain that the assessment made by the assessor was fraudulent: *Spring Valley Coal Co. v. People*, 157 Ill. 543.

general rule is that if one fails to appeal to the statutory board

if regular and not fraudulent: *Detroit Citizens' St. R. Co. v. Common Council*, 125 Mich. 673. The taxpayer's remedy, in all ordinary cases, for errors in his assessment, is to go before the board of equalization; and, failing to obtain redress, to seek it by writ of error: *Rhea v. Umatilla County*, 2 Or. 298; *Pophill v. Yamhill County*, 8 Or. 338; *Oregon & M. M. Sav. Bank v. Jordan*, 16 Or. 113. The proceedings of a board of equalization after it has acquired jurisdiction will not be annulled on writ of error merely because the evidence on which its findings were based is not in the record: *Becker v. Malheur County*, 24 Or. 217. The state board's determination on a taxpayer's appeal from an assessment can only be set aside for error at law, and the review will be limited to ascertaining whether there was any evidence before the board on which to base its determination: *Elizabeth v. New Jersey Jockey Club*, 63 N. J. L. 515. See *Commonwealth v. Delaware, S. & S. R. Co.*, 165 Pa. St. 44. In the absence of proof the court will not interfere with the valuation by the state board of assessors, at the taxing date, of a railroad company's franchise: *State v. Bettie*, 50 N. J. L. 132. Where a board has a statutory power to determine upon exemptions, its action cannot be ignored, and a review had on injunction: *Preston v. Johnson*, 104 Ill. 625; *West Bend v. Brown*, 47 Iowa 25. After a board of equalization has acted on an assessment it is too late to raise the objection that deductions for indebtedness have not been allowed: *State v.*

London & N. W. American Mortg. Co., 80 Minn. 277. A taxpayer in Kentucky can avoid excessive valuation only by appealing from the action of the board of supervisors to the judge of the county court, not by enjoining the board: *Mossett v. Newport & C. Bridge Co. (Ky.)*, 50 S. W. Rep. 63. A statute providing that the valuation made by the board of equalization shall be final, does not preclude the court's correcting mathematical errors: *State v. Travelers' Ins. Co.*, 70 Conn. 590. In Idaho the action of the state board of equalization in reducing and increasing the valuation of certain classes of property in a county for the purposes of taxation is reviewable in a proper suit, or, in case no suit can be brought, on *certiorari*: *Orr v. State Board*, 2 Idaho 923. On review of assessments under a statute which authorizes the board to increase or lessen if "satisfied from the evidence taken," an arbitrary increase without evidence is void: *Shove v. Manitowoc*, 57 Wis. 5, distinguishing *McIntyre v. White Creek*, 43 Wis. 620, and *Lawrence v. Janesville*, 46 Wis. 364. That in Nebraska a city board of equalization has no power to increase the valuation of all the property in the city, see *Kittle v. Shervin*, 11 Neb. 65. That in North Carolina the county commissioners, sitting as a board of review, can, of their own motion, raise the valuations of property, see *Commissioners v. Atlanta, etc. R. Co.*, 86 N. C. 541. And they can rescind their action in exonerating a taxpayer if they become satisfied it is erroneous: *Lemly v. Com-*

of review, he can have no remedy in the courts.¹ But where the defect is jurisdictional one does not lose rights by failing

missioners, 85 N. C. 379. Where property is to be assessed by value, an appellate assessing board cannot add a penalty on affirming an assessment: *Jones v. Commissioners*, 5 Neb. 561. Or costs: *Hall v. Greenwood Co.*, 22 Kan. 37.

¹ See *Altschul v. Gittings*, 80 Fed. Rep. 200; *Price v. Kramer*, 4 Colo. 546; *Barnett v. Jaynes*, 26 Colo. 279; *Royer Wheel Co. v. Taylor County*, 104 Ky. 741; *Louisiana Brewing Co. v. Board of Assessors*, 41 La. An. 585; *Peninsular Iron, etc. Co. v. Crystal Falls T'p*, 60 Mich. 510; *Meade v. Haines*, 81 Mich. 261; *Brown v. Grand Rapids*, 83 Mich. 101; *Michigan Savings Bank v. Detroit*, 107 Mich. 246; *Detroit River Savings Bank v. Detroit*, 114 Mich. 81; *State v. Reed*, 159 Mo. 77; *First Nat. Bank v. Bailey*, 15 Mont. 301; *Duck v. Peeler*, 74 Tex. 268; *Bratton v. Johnson*, 76 Wis. 430; *Wisconsin County Com'rs v. Seabright Cattle Co.*, 3 Wyo. 777. The same principle applies to local assessments for special improvements: *Jennings v. Le Breton*, 80 Cal. 8; *Fanning v. Lewiston*, 93 Cal. 146; *Perine v. Forbush*, 97 Cal. 305; *McSherry v. Wood*, 102 Cal. 647; *Dowling v. Conniff*, 103 Cal. 75; *Warren v. Riddell*, 106 Cal. 352; *Buckman v. Landers*, 111 Cal. 347; *Wells v. Wood*, 114 Cal. 255; *Ferguson v. Stamford*, 60 Conn. 432; *Garrett v. Trustees*, 125 N. Y. 436; *Potter v. Black*, 15 Wash. 186; *New Whatcom v. Bellingham Bay Imp. Co.*, 18 Wash. 181; *Northwestern & P. H. Bank v. Spokane*, 18 Wash. 456. If it appears that the board of review proceeded on

erroneous principles, a court may, perhaps, correct the valuation, but an error in the fact of the value of property cannot judicially be corrected: *Wilmington, etc. R. Co. v. Brunswick County*, 72 N. C. 10; *Wade v. Craven County*, 74 N. C. 81; *Richmond, etc. R. Co. v. Orange County*, 74 N. C. 506. One who insists that his shares of national bank stock have been overvalued in comparison with other moneyed capital may not recover back the amount of the taxes paid by him thereon without first having invoked justice from a board established by the state for the correction of errors, the powers of such board being adequate to afford relief in the premises: *Stanley v. Albany Supervisors*, 121 U. S. 535; *Williams v. Albany Supervisors*, 122 U. S. 154. So, a compliance with the statute providing for a hearing by the board of equalization of complaints as to assessments was held a condition precedent to an action for the recovery of taxes paid under protest: *Ward v. Alsup*, 100 Tenn. 619. That a person was unaware that he had been assessed for personal taxes would not excuse his failure to appear before the board of equalization to have an erroneous assessment corrected: *Nugent v. Bates*, 51 Iowa 77. Where one had an opportunity to show before the board of review that the valuations of his property were correct and should not be changed, he could not afterwards complain that the board did not produce before him the evidence upon which it acted in increasing his assessment: *American Express Co. v.*

to appeal to a board or council which could not have remedied the defect.¹

For a merely irregular assessment the statutory remedy is also the exclusive remedy. It is supposed to be adequate to all the requirements of justice, and it is the person's own folly if he fails to avail himself of it.²

Raymond, 189 Ill. 232. It was held in *Nelson v. Saginaw*, 106 Mich. 659, that in a suit to set aside an assessment for a sewer an objection that the construction of the sewer was not embraced in the report of the board of public works as required by the city charter, could not be considered, as party complaining had not availed himself of his right to have the assessments made by said board reviewed by the city council.

¹ *Brock v. Luning*, 89 Cal. 316; *Manning v. Den*, 90 Cal. 610; *McBean v. Redick*, 96 Cal. 191; *Perine v. Forbush*, 97 Cal. 305; *Partridge v. Lucas*, 99 Cal. 519; *San Jose Imp. Co. v. Auzerals*, 106 Cal. 498; *Chase v. City Treasurer*, 122 Cal. 540; *Galveston County v. Galveston Gas Co.*, 54 Tex. 287, 72 Tex. 509. See *Miller v. Amsterdam*, 149 N. Y. 288; *Hutcheson v. Storrie*, 92 Tex. 685. Under the California statute one is not estopped, in an action to foreclose an assessment for a street improvement, from showing want of jurisdiction, by his having made the ground of jurisdiction one of the grounds of his appeal: *California Imp. Co. v. Moran*, 123 Cal. 373, citing earlier cases. Where one applies to the courts for relief against a tax which there was no power to impose, it cannot be objected that no appeal was taken to the board of equalization, that body having no power in the premises; and relief may be had on *certiorari* or in

equity: *Alexandria Canal R. etc. Co. v. District of Columbia*, 5 Mackey 376. The jurisdiction of the board of equalization is not exclusive where a tax is levied without authority of law upon property exempt from taxation, or under an unconstitutional statute, or the like; and collection of the tax may be enjoined: *Barber v. Farr*, 54 Iowa 57, citing *Powers v. Bowman*, 53 Iowa 359, and *Smith v. Osburn*, 53 Iowa 474. The right to question an excessive assessment entered by clerical error held not lost by failure to go to the board of equalization for relief before bringing *mandamus* to compel correction, or before paying the tax under protest and suing to recover the excess: *Smith v. McQuiston*, 108 Iowa 363. Where the assessor lists against a taxpayer from whom he has not demanded a list, property which he does not own as well as property which he owns, and where the board of equalization adds other property not owned by such taxpayer, the latter, without applying to the board for an abatement, may sue to recover the illegal taxes compulsorily paid: *Powder River Cattle Co. v. Board of Com'rs*, 45 Fed. Rep. 323.

² *Ogden City v. Armstrong*, 168 U. S. 224; *Conlin v. Seaman*, 22 Cal. 546; *Emery v. Bradford*, 29 Cal. 75; *Nolan v. Reese*, 32 Cal. 484; *Chambers v. Satterlee*, 40 Cal. 497, 519; *Windsor v. Field*, 1

The grounds on which one should have an abatement are not necessarily such as arise on a consideration of his assessment considered by itself, but they may include the assess-

Conn. 279; *Peoria v. Kidder*, 26 Ill. 351; *Republic L. Ins. Co. v. Pollak*, 75 Ill. 292; *Chicago, etc. R. Co. v. Cole*, 75 Ill. 591; *Ottawa Glass, etc. Co. v. McCaleb*, 81 Ill. 556; *Patterson v. Baumer*, 43 Iowa 477; *Beeson v. Johns*, 59 Iowa 166; *New Orleans v. Canal, etc. Co.*, 32 La. An. 157; *Deane v. Todd*, 22 Mo. 90; *Aldrich v. Railroad Co.*, 21 N. H. 359; *Hughes v. Kline*, 30 Pa. St. 230. One cannot complain that the assessment of a tax was made in the wrong person's name, or of any other irregularity which the board of review might have corrected had application been made to it at the proper time: *Meade v. Haines*, 81 Mich. 264; *Hinds v. Belvidere T'p*, 107 Mich. 664. It is held in Louisiana that it is a condition precedent to the taxpayer's maintenance of an action in the courts that previous and timely effort has been made to have the alleged error corrected by the proper board: *Shattuck v. New Orleans*, 39 La. An. 206; *Leeds & Co. v. Hardy*, 43 La. An. 810. It is said in Maryland that if the party fails to avail himself of the remedy given by statute, he cannot come into equity unless he makes out a very clear case; by which is meant, doubtless, a case within the ordinary jurisdiction of equity: *Church v. Baltimore*, 6 Gill 391; *O'Neal v. Bridge Co.*, 18 Md. 1. Suit will not lie at law for the levy of an irregular or excessive assessment which might be corrected on review or appeal: *McSherry v. Wood*, 102 Cal. 647; *Wright v. Boston*, 9 Cush. 233; *Bourne v. Boston*, 2 Gray, 494;

Commonwealth v. Cary, etc. Co., 98 Mass. 19. Where an ordinance for improving a street provides that abutting owners may appear and object to the assessment, one who does not object cannot afterwards complain of the assessment: *Tumwater v. Pix*, 18 Wash. 153. Where a municipality acts within its powers in ordering and contracting for the construction of a sewer, a property owner who does not protest and follow the special remedies given by statute cannot be relieved by the courts of the tax levied therefor: *Harney v. Benson*, 113 Cal. 314. That the rule of conclusiveness of action is applicable to appellate tribunals also, see *Weaver v. State*, 39 Ala. 535; *Alexandria, etc. Bridge Co. v. District of Columbia*, 1 Mackey 217; *Adsit v. Lieb*, 76 Ill. 198; *Union Trust Co. v. Weber*, 96 Ill. 347; *New Orleans Gas Light Co. v. Assessors*, 31 La. An. 270, 475. In New York, if an assessment of capital stock is made on a wrong basis, the statutory remedy must be sought; the court of appeals cannot interfere: *People v. Coleman*, 107 N. Y. 541. Where the statute leaves open to judicial inquiry all questions of a jurisdictional character, a determination of such questions by an administrative board does not preclude aggrieved parties from resorting to judicial remedies: *Ogden City v. Armstrong*, 168 U. S. 224. Assessing lands as town lots by number, when no plat is recorded or mentioned, is not merely irregular, but fatally defective: *People v. Chicago, etc. R. Co.*, 96 Ill. 369;

ments of others so far as, by reason of their not being what they should be, they affect him injuriously. One may, therefore, justly claim an abatement of an assessment which, considered by itself, is not too high, if those of others are relatively and purposely made too low.¹ He may also ask that an assessment made without jurisdiction be vacated; though this is not

Johnston v. Scott, 11 Mich. 232. An erroneous exemption by assessors of property from taxation is an erroneous judgment of a court of assessment, and is reversible by the common-law power of general superintendence for correcting errors of courts of inferior jurisdiction where the laws have not expressly provided a remedy: Boody v. Watson, 64 N. H. 162.

¹ Pelton v. National Bank, 101 U. S. 143; Cummings v. National Bank, 101 U. S. 153; Manchester Mills v. Manchester, 57 N. H. 309. See Row v. People, 87 Ill. 385. It was held in Lowell v. Middlesex County Com'rs, 152 Mass. 372, that if the complainant's property is not assessed above its fair cash value, no abatement can be allowed because other like property is assessed at less than its fair cash value. And in the same case it was decided that a taxpayer is not entitled to an abatement because a single valuation has been placed on different items which the statute requires to be valued separately. An abatement of taxes is granted on the ground that the sum assessed is in excess of petitioner's share of the common burden, and not because the appraisal of his estate is dissimilar to that of other taxpayers in the same business or owning the same kind of property; and the overvaluation of some classes of a taxpayer's estate does not entitle him to an abatement if the error

is neutralized by an undervaluation of other property: Amoskeag Manuf. Co. v. Manchester, 70 N. H. 200. On a petition for an abatement of a real-estate tax, the appraisal complained of may be compared with the appraisal of other real estate in the same town for the purpose of ascertaining whether the assessment was proportional, and whether justice requires an abatement: Manchester Mills v. Manchester, 58 N. H. 38. The maxim *de minimis non curat lex* may properly be applied in this class of cases: Ibid. Upon a petition for abatement of taxes on the land and buildings of a manufacturing establishment, the admission of evidence of the value of real estate of other than manufacturing establishments was held not objectionable: Manchester Mills v. Manchester, 57 N. H. 309. The tax upon polls cannot be considered in determining the amount of the abatement to which a taxpayer is entitled because of overvaluation of his real estate: Amoskeag Manuf. Co. v. Manchester, 70 N. H. 336. As to grounds for reduction of an assessment on a building, see New Orleans Cotton Exchange v. Assessors, 39 La. An. 95. Upon an application for an abatement the valuation on a like complaint of a previous assessment is not conclusive: Lowell v. Middlesex County Com'rs, 152 Mass. 372.

essential, since such an assessment is altogether illegal and may for that reason be disregarded and contested when steps are taken to enforce it.¹ And he has a right to be heard upon any grounds which, in his view, make his assessment wanting in conformity to the law, or either positively or relatively unequal or unjust.² In Massachusetts the right to abatement is not precluded by paying the tax under protest.³ It is provided in some states that whatever reduction is allowed shall be credited upon the next tax.⁴ Interest cannot be recovered on an abatement unless the statute provides for it;⁵ nor costs.⁶

To render the action of appellate assessing boards final upon individuals, it is necessary that the boards themselves should observe such statutory rules as have been prescribed for them for

¹ See *Commonwealth v. Cary*, etc. Co., 98 Mass. 19; *Williams v. Saginaw*, 51 Mich. 120; *Weller v. St. Paul*, 5 Minn. 95. One who appeals from an assessment to the board of county commissioners on the ground that the taxes are illegal, is not precluded thereby from resorting to the courts to test the validity of such taxes; the board not having judicial power to pass on the validity of a tax: *County Com'rs v. Wilson*, 15 Colo. 90. It is held in New Hampshire, that when a tax illegally assessed has been paid under the impression that the assessment was legal, it cannot be recovered, the remedy for an illegal assessment being an appeal: *Bradley v. Laconia*, 66 N. H. 269. It was held in *Hutcheson v. Storrie*, 92 Tex. 685, that an assessment illegal because not made on the basis of benefits may be questioned without showing the amount of benefits.

² In the case of a special assessment objection may be taken to the items that make up the cost for which the assessment is laid:

Grace v. Board of Health, 135 Mass. 490.

³ *National Bank v. New Bedford*, 155 Mass. 313.

⁴ See *Boston, C. & M. R. Co. v. State*, 64 N. H. 490; *Cloud v. Norwich*, 57 Vt. 448. A railroad company which has paid a tax in part unconstitutional is entitled to have that part applied to valid taxes accruing subsequently: *Northern Pac. R. Co. v. Raymond*, 5 Dak. 356. See *State v. Missouri Pac. R. Co.*, 92 Mo. 137.

⁵ *Lowell v. County Com'rs*, 3 Allen 550. It is held in New Hampshire, upon the ground that no one should be compelled to pay more than his share of the public expense, that one who has paid the tax assessed against him is entitled upon abatement to judgment for interest upon the excess: *Boston & M. R. Co. v. State*, 63 N. H. 571; *Amoskeag Manuf. Co. v. Manchester*, 70 N. H. 336. It was held in *Boott Cotton Mills v. Lowell*, 159 Mass. 383, that interest is recoverable only from demand, not from abatement.

⁶ *Lowell v. County Com'rs*, 3 Allen 556.

the protection of the interests of taxpayers. If, for example, the board by law is required to meet at a certain specified time, and it meets at another at which taxpayers have neither actual nor constructive notice to appear, its action at such time is unauthorized and invalid; and so it will be if the statute requires notice to be given of its meetings, and the record of the board shows no notice.¹

In some states an appeal is given from the assessors, or from assessing boards, to some specified courts, to which are given limited powers of review.² But the right to such an appeal is purely statutory;³ unless the constitution so prescribes an act

¹ *Nixon v. Ruple*, 30 N. J. L. 58. In *Kelly v. Corson*, 8 Wis. 182, and 11 Wis. 1, the effect of errors in the action of a board of equalization was considered. See *Marsh v. Supervisors*, 42 Wis. 502; *Ross v. Crawford County Com'rs*, 16 Kan. 411.

² Under the Arkansas statute giving right of appeal from a county board's equalization of taxes to the county court, no special formality is essential. An application to the court for the correction of errors is all that is essential: *Prairie County v. Matthews*, 46 Ark. 383. Although the levying of an assessment by the board of directors of an irrigation district is an act of legislative character, yet the board is not clothed with the supremacy of the legislature in this respect, but is in the exercise of a delegated power, and subject to control by the judiciary if it steps beyond the limits of the power conferred upon it: *Hughson v. Crane*, 115 Cal. 404. In Connecticut a statute authorizing a special valuation of property for taxation is unconstitutional in providing an appeal therefrom to the superior court, since the preparation of the list and the court's action on appeal

therefrom are an administrative and not a judicial act: *Bradley v. New Haven*, 73 Conn. 646. It is held in Dakota that an appeal lies from the decision of the board of county commissioners fixing the valuation of property for taxation made when such board is acting as a board of equalization: *Pierre Water Works Co. v. Hughes County*, 5 Dak. 145. In Louisiana, after refusal by the assessors to reduce an assessment, and after the rolls have been delivered to the collecting officers, the assessors may be brought into court by the aggrieved party, and their action reviewed: *Gay v. Assessors*, 34 La. An. 370. Such revision, correction, arbitration, or equalization as the board of reviewers may make of assessments are subject to review by the courts, and the board's action is final unless set aside or changed as provided by law: *State v. State Tax Collector*, 39 La. An. 530.

³ *Hughes v. Parker*, 148 Ind. 692; *Marion County Court v. Wilson* (Ky.), 49 S. W. Rep. 8; *Paducah St. R. Co. v. McCracken* (Ky.), 49 S. W. Rep. 178; *Hower's Appeal*, 127 Pa. St. 134; *Olympia Water Works v. Board of Equalization*, 14 Wash. 268. Unless guaranteed

is not invalid because not providing for appeal;¹ and the appeal must be taken within the time fixed by the statute.² The court, whatever its grade, is, for such a purpose, of limited jurisdiction, and must keep within it.³ Under a statute pro-

by the constitution there is no vested right in an appeal; and, therefore, the Illinois revenue act of 1898 is constitutional although it takes away from property owners in cities of more than 125,000 inhabitants the right to an appeal to the county board of review in cases of unjust assessment for the year 1898: *People v. Board of Com'rs*, 176 Ill. 576. A statute held to authorize, by implication, an appeal to the circuit court from a decree of the commissioners' court increasing a tax assessment: *Ex parte Howard-Harrison Iron Co.*, 119 Ala. 484.

¹ See *ante*, pp. 64-65. A statute is not rendered invalid by reason of its not providing for an appeal from the apportionment by the superintendent of streets of the assessable cost of a sewer, since an error of law by the superintendent may be corrected by *certiorari*, or on an application for an abatement: *Weed v. Boston*, 172 Mass. 28. A constitutional declaration that every person, for an injury done him, shall have a remedy at law, is not contravened by a statute which fails to allow an appeal to the courts from an assessment by the city council of the cost of constructing sewers under the provisions of the act: *Oil City v. Oil City Boiler Works*, 152 Pa. St. 348.

² If appeal to a court is not made in the statutory time, the court has no jurisdiction: *Wells v. Board of Education*, 20 W. Va. 157. A motion to vacate an assessment may be lost by lapse of time: *Matter of Lord*, 78 N. Y.

109, 21 Hun 555; *Matter of Brady*, 46 N. Y. Sup. Ct. 36. If an appeal from the action of a board of equalization is given it cannot be lost by the board's irregular action: *Ingersoll v. Des Moines*, 46 Iowa 553. A provision that any proceeding to test the validity of any "sale" of land for taxes imposed prior to a certain year shall be commenced within one year from the passage of the act, does not apply to a proceeding to test the validity of an "assessment:" *In re Trustees of Union College*, 129 N. Y. 308.

³ Thus a statute allowing an appeal to the circuit court from the decision of a city board of equalization, cannot be extended to parties or cases other than those whom it specifies: *Grigsby v. Minnehaha County*, 5 S. D. 561. When the statute allows an appeal to the court from an illegal assessment, the illegality must be in a matter of law, independent of the exercise of discretion as to value vested in the taxing officers: *Shear v. Columbia County Com'rs*, 14 Fla. 76. When the statute provides a special remedy for the collection of a personal tax by suit, and a mode of reviewing the judgment, the party is confined to that mode of review: *Washington County v. German American Bank*, 28 Minn. 360. If, under the statute, the only question raised by an appeal from a decision of county supervisors refusing to abate certain taxes, is as to the liability of the property to taxation, the correctness or regularity

viding that a tax may be held illegal where it is unauthorized by law or illegally assessed, the proper court has power to re-

of the assessment cannot be considered: *Major v. Pavey*, 134 Ill. 19; *Keokuk & H. B. Co. v. People*, 185 Ill. 276. Where the statute which authorizes appeals from the decisions of the board of equalization correcting assessments provides that on such an appeal the matter shall be tried anew, a judgment based solely on the assessment made by the board is unauthorized: *Birmingham B. & L. Assoc. v. State*, 120 Ala. 403. In Iowa on an appeal from the action of a board of equalization in increasing an assessment, the district court must try the matter anew and make a just assessment without reference to the board's action: *Lyons v. Board of Equal.*, 102 Iowa 1. Also as to the power of the district court in Iowa on such appeals, see *Cedar Rapids & M. C. R. Co. v. Cedar Rapids*, 106 Iowa 476. When special appeal to a subordinate is given, there can be no appeal thence to the supreme court unless expressly given, but *certiorari* will lie to review regularity: *Kimber v. Schuylkill Co.*, 20 Pa. St. 366. Under the Iowa statutes giving the supreme court jurisdiction over judgments of courts of record in special proceedings, a city, or its board of equalization in its behalf, may appeal from a judgment of the district court canceling an assessment rendered on appeal from the board of equalization, though the city or board had no right in the first instance to appeal to the district court: *Farmers' L. & T. Co. v. Newton*, 97 Iowa 502. Under the New York statute an assessment is subject to review in the supreme

court if it is found to be "illegal, erroneous, or unequal," but when an assessment violates no absolute rule of law the court of appeals has no power to interfere on a question of valuation: *People v. Coleman*, 107 N. Y. 541. Under a statute providing an appeal to the court from a board of revision by a person aggrieved by any assessment or valuation, such appeal must be dismissed where it is claimed the property was wholly exempt as church property: *Albert v. Board of Revision*, 139 Pa. St. 467. Where a city charter authorizes the vacating of assessments for improvements for "errors in proceedings relative to an assessment," an appeal lies for errors in proceedings by the city authorities in letting contracts for work on streets to pay for which the assessment is made: *In re Pennie*, 108 N. Y. 364. As to who is a "party aggrieved" and entitled to appeal in New York, see *Matter of Phillips*, 60 N. Y. 16; *Petition of Gantz*, 85 N. Y. 536; *Schultze v. New York*, 103 N. Y. 307. As to joinder of parties in petition for review, see *People v. Feitner*, 163 N. Y. 384. For the method of reviewing in New York, see *Strusburgh v. New York*, 45 N. Y. Sup. Ct. 508. Under the New York statutes where an assessment is illegal the court cannot order a reassessment but the only remedy is to strike the assessment from the roll: *People v. Valentine*, 5 App. Div. (N. Y.) 520, 38 N. Y. Supp. 1087. Conclusion of board of commissioners not disturbed unless it appears that there has been a manifest error in the

view a tax where it is charged that property not assessable was in fact assessed.¹

Refunding taxes. This is only an abatement, made after the tax has been paid or enforced. A general right exists in the state to refund any tax collected for its purposes, and a

manner of making the estimate, or that evidence which should be controlling has been disregarded: *People v. Barker*, 6 App. Div. (N. Y.) 356, 36 N. Y. Supp. 682. In Iowa, where the district court on appeal from the decision of a board of equalization has failed to give proper relief, the supreme court, on appeal, will give it where to make a radical change in the whole assessment would create confusion: *Burnham v. Barber*, 70 Iowa 87. Where on appeal to the district court from an assessment the evidence shows that the appellant had sold the property before the year for which it was taxed, the court cannot grant an amendment to the pleadings so as to assess the tax on moneys and credits: *Brown v. Grand Junction*, 75 Iowa 488. In Oregon the courts on writ of review from the action of the state board of equalization cannot correct irregularities of the assessors and county boards in making up the assessment rolls: *Dayton v. Board of Equal.*, 33 Or. 131. As to the proper judgment of the court in Connecticut on appeal from the board of review in the matter of an assessment, see *Ives v. Goshen*, 65 Conn. 456; *Greenwoods Co. v. New Hartford*, 65 Conn. 461. That the power to hear an appeal for abatement of a tax is judicial, see *Edes v. Boardman*, 58 N. H. 580, questioning *Auditor v. Railroad Co.*, 6 Kan. 500. The appeal is an equitable proceeding, and only so

much of the tax will be abated as the appellant should not pay: *Edes v. Boardman*, 58 N. H. 580. See *Carpenter v. Dalton*, 58 N. H. 615. As to the conclusiveness of the judgment on appeal from the selectmen's refusal in New Hampshire to abate taxes, see *Winnipeg Lake, etc. Co. v. Laconia*, 68 N. H. 284. In Wisconsin it has been held that the courts will not examine and weigh the evidence upon which the board of review acts in raising or reducing valuations, if there was before the board competent evidence warranting its decision: *State v. Gaylord*, 73 Wis. 306. Where an assessment is conclusive on the city but not on the lot-owner, the latter has the burden of showing, on the appeal, that his assessment is more than his due proportion: *Dickson v. Racine*, 65 Wis. 306. The burden of showing an assessment to be arbitrary is on him who attacks it: *Wright v. Forrestal*, 65 Wis. 341. It is unnecessary to adduce evidence to justify an assessment which apparently has been legally made. It stands until it is shown by satisfactory proof to be erroneous: *Merchants' Mut. Ins. Co. v. Board of Assessors*, 40 La. An. 371. And the burden of proving a valuation for the purpose of taxation to be excessive is upon the taxpayer: *New Orleans Cotton Exchange v. Assessors*, 37 La. An. 423.

¹ *Detroit v. Wayne Circuit Judge*, 127 Mich. 604.

corresponding right probably exists in the common council, or other proper boards, of cities, villages, towns, etc., to refund to individuals any sums paid by them as corporate taxes which are found to have been wrongfully exacted, or are believed to be, for any reason, inequitable. But no executive or ministerial officer could have any such authority, unless expressly given by law.¹ A federal statute authorizes the commissioner

¹ In Alabama it has been held that a claim for taxes paid by mistake need not be verified or itemized as required by the code provision relating to claims against the state: *White v. Smith*, 117 Ala. 232. And the statute was held to impose upon the county treasurer and state auditor a ministerial duty in regard to the repayment of taxes so paid: *Ibid.* Under the California code provision that "any taxes, penalties and costs, paid more than once, or erroneously or illegally collected, may, by order of the board of supervisors, be refunded by the county treasurer," a taxpayer who had paid taxes upon personalty which by clerical error was overstated, was held entitled to recover the excess over the amount lawfully due: *Pacific Coast Co. v. Wells*, 134 Cal. 471. So, where by some mistake real estate had been twice assessed: *Hayes v. Los Angeles*, 99 Cal. 74. It was said in *Pacific Coast Co. v. Wells*, *supra*, that "undoubtedly the rule would not apply to correct an assessment where the taxpayer has merely changed his opinion as to the value of his property." The word "may" in the California statute means "shall," and, thus construed, the board has no discretion to allow or reject a claim for taxes actually paid a second time, so that, on a refusal to allow such claim, action therefor lies against

the county without also making the state a party defendant: *Hayes v. Los Angeles*, 99 Cal. 74. Under the Florida statute relief cannot be given in statutory proceedings by petition for refunding unless the assessment is illegal or not "lawfully made;" and if the assessment was lawfully made, but relief is demanded because of matters accruing after it was made rendering inequitable or illegal the collection of the tax, the remedy is by proceedings at law or in equity: *Tampa v. Kaunitz*, 39 Fla. 683. Ordinance in a city in Illinois held not to constitute an agreement to refund illegal taxes: *Conkling v. Springfield*, 132 Ill. 420. Under the Indiana statute requiring taxes wrongfully assessed to be refunded though paid voluntarily, it was held that "wrongfully" was not equivalent to "illegally," and that to entitle one to repayment it must appear not only that the taxes were irregularly assessed, but that they were not legally or equitably due from him: *Howard County v. Armstrong*, 91 Md. 528. See *Durham v. Board*, etc., 95 Ind. 182; *Henry County v. Murphy*, 100 Ind. 570. Said statute applies where the county auditor, after the county board of equalization had acted, wrongfully increased the valuation of all lands in the township, and caused the county treasurer to col-

of internal revenue, subject to regulations prescribed by the secretary of the treasury, to refund, on appeal to him, all taxes

lect taxes on the basis of the illegal assessment: *Board of Com'rs v. Senn*, 117 Ind. 410. The Indiana statute providing that a city council may, at any time, order the amount erroneously assessed and collected from any taxpayer to be refunded to him, is mandatory: *De Pauw Plate Glass Co. v. Alexandria*, 152 Ind. 443. In Iowa, under a statute providing that the board of supervisors shall direct the county treasurer to refund any tax illegally or erroneously assessed or exacted, a voluntary payment of a tax which never was legally levied may be recovered: *Isbell v. Crawford County*, 40 Iowa 102, following *Lauman v. Des Moines County*, 29 Iowa 310. And under such statute a demand must be made on the board of supervisors before suit can be brought against the county, whether the claim for a refunding is liquidated or unliquidated: *Bibbins v. Clark*, 90 Iowa 230. Where the board of supervisors orders a tax rebated after it has been paid, the county treasurer has no authority to repay it without an order therefor from the board: *Crosby v. Floete*, 65 Iowa 370. The board of supervisors cannot rebate the tax where the person aggrieved by an assessment erroneous but not void has not applied for redress to the city or township board of equalization within the time prescribed by law: *Van Wagenen v. Board of Supervisors*, 74 Iowa 716. How school taxes should be refunded in Iowa where the district was divided after the tax was laid, see *Spencer v. Riverton*, 56 Iowa 85. A local

aid tax, where the money has been deposited with the county treasurer, should be refunded from that fund: *Barnes v. Marshall County*, 56 Iowa 20. See *Des Moines, etc. R. Co. v. Lowry*, 51 Iowa 486; *Stone v. Woodbury County*, 51 Iowa 522. The refunding must be from the several funds to which the tax was apportioned when collected, and when it appears that the erroneous tax has been wholly paid out for road and school district purposes the county is not liable unless it is shown that there is money in the treasury belonging to those funds: *Iowa R. Land Co. v. Woodbury County*, 64 Iowa 212. A taxpayer's petition to the county board for refunding of school taxes need not make the school district a party or notify it; and where land had been taxed in a certain district for thirty years or more, without objection, it must be held to be a part of such district for purposes of taxation: *Independent District v. Taylor*, 100 Iowa 617. In Kentucky, where a bank has paid money into the state treasury as taxes, supposing that it could do so in lieu of county and city taxes, its right to demand a warrant from the auditor for the repayment of the money was barred after two years, though it was finally decided by the court that the money was improperly paid into the state treasury, and though the bank had relied upon a former decision to the effect that the payment was proper: *Bank of Commerce v. State (Ky.)*, 36 S. W. Rep. 683. Where taxes improperly collected by a county

erroneously collected.¹ And there is also a provision for the refunding of surplus moneys received from the sale of lands

have been refunded, the county cannot thereafter recover the amount as paid back under mistake of law, though the collection was illegal for a reason other than that supposed at the time of the refunding: *Graves County v. First Nat. Bank* (Ky.), 56 S. W. Rep. 16. Of the proceeding in New York under the special statute which confers power upon the board of supervisors to refund to any person the amount of an illegal tax collected from him, it is said: "This proceeding is not governed by the technical rules that apply to actions at law to recover money voluntarily paid, or to suits in equity to remove a cloud upon title. The statute furnishes a convenient and summary remedy, which enables the county to restore, without litigation or expense, what it ought not to retain, and a citizen who has paid an illegal tax, without waiting to have his property advertised and sold, to obtain justice. The benefits of the statute are not confined to parties who have paid an illegal tax upon compulsion, but extend to all persons who have paid taxes that they were legally bound to repay." *Adams v. Monroe Supervisors*, 154 N. Y. 625. See, also, *People v. Otsego Supervisors*, 51 N. Y. 401; *People v. Madison Supervisors*, 51 N. Y. 443; *Boardman v. Tompkins Supervisors*, 85 N. Y. 359; *People v. Barker*, 140 N. Y. 437. "The power to refund a tax once paid conferred by statute upon a board or officers of special

and limited jurisdiction does not carry with it by implication the power to cancel before payment a tax illegally extended upon the rolls, or to restrain its collection:" *Buffalo Mut. Gaslight Co. v. Erie Supervisors*, 144 N. Y. 228. A statute authorizing the refunding of any tax "illegally or improperly assessed or levied," does not authorize an order to refund a tax legally assessed, though the assessment may be voidable, the term "improperly assessed" not extending the court's power to order taxes refunded unless they were illegally assessed: *In re Baumgarten*, 39 App. Div. 174, 57 N. Y. Supp. 284. Said statute held to apply to a case where a resident who was assessed for personalty showed that he had none: *Matter of Coleman*, 30 Hun 544. A provision for the refunding of taxes illegally assessed has no application to the voluntary payment of an illegal assessment by one who was under no legal obligation to pay: *McCue v. Monroe Supervisors*, 162 N. Y. 235. Under a statute providing that an officer shall revise and readjust any settled account against a corporation for certain taxes, whenever it shall appear to him that such account was illegally paid, or was so made as to include taxes that could not lawfully have been demanded, and that he shall "charge or credit" thereon the difference, if any, resulting from such revision, he is not authorized to refund any sum paid in excess of

¹ See *Stotesbury v. United States*, 146 U. S. 196, affirming

same case, 23 Ct. Cl. 285; *Hicks v. James's Adm'r*, 48 Fed. Rep. 542.

under the direct-tax law.¹ Under a provision for the payment of certain sums to the "legal owners" of lands sold for taxes, under the direct-tax acts, it has been held that a mortgagee of lands is not the "legal owner."²

Remedy by certiorari. At the common law the writ of *certiorari* lies to remove into the supreme court of judicature the proceedings of inferior tribunals, in order that their errors may be corrected when it is alleged that they have exceeded their jurisdiction.³ In some of the states, considerable use has been made of this writ in tax cases, sometimes with, and sometimes without, statutory regulations. When the writ is by statute, a broader scope may be, and usually is, given to it than it has at the common law.⁴ The common-law writ is not one of right,

what was lawfully due, and such sum must remain in the treasury, but may be applied on future taxes: *People v. Wemple*, 133 N. Y. 617. For proceedings under the Ohio statute, which, when a drain tax is set aside, authorizes the court to proceed to determine what is justly chargeable to plaintiff, and award accordingly, see *Peck v. Watros*, 30 Ohio St. 590. Under the Oregon statute providing that when an assessor of taxes returns too much "the sheriff may remit the excess" on the owner's affidavit, the sheriff has no discretion in the matter, nor can he inquire into the truth or falsity of the statements in the affidavit: *Smith v. King*, 14 Or. 10. Such statute does not require the sheriff to remit taxes assessed by the board of equalization, on the taxpayer's affidavit denying ownership of the property assessed: *Kirkwood v. Ford*, 34 Or. 552. Under the Wyoming statute it is not sufficient that some irregular or unauthorized method was resorted to in the assessment, but it must appear that the tax itself was erroneous or illegal; that is, that it

was not justly or equitably due from the taxpayer: *Board of Com'rs v. Searight Cattle Co.*, 3 Wyo. 787; *Carton v. Board of Com'rs (Wyo.)*, 69 Pac. Rep. 1013.

¹ See *Ravenel v. United States*, 23 Ct. Cl. 192; *Beaumont v. United States*, 25 Ct. Cl. 349; *Chaplin v. United States*, 29 Ct. Cl. 231; *Murray v. United States*, 29 Ct. Cl. 366.

² *Glover v. United States*, 29 Ct. Cl. 236.

³ *People v. Commissioners of Highways, etc.*, 30 N. Y. 72; *People v. Betts*, 55 N. Y. 600, 602. The remedy held not available in favor of a city as to a tax due the state: *Nashville v. Smith*, 86 Tenn. 213.

⁴ For the proceedings on *certiorari* in New Jersey, see *Woodbridge v. State*, 43 N. J. L. 262; *Citizens' Gaslight Co. v. Alden*, 44 N. J. L. 648; *Conover v. Houce*, 46 N. J. L. 347; *State v. Morris*, 48 N. J. L. 99; *Central R. Co. v. State Assessors*, 49 N. J. L. 1; *State v. Pownell*, 49 N. J. L. 169; *State v. State Assessors*, 54 N. J. L. 90; *Simmons v. Passaic*, 55 N. J. L. 485; *Walls v. Jersey City*, 55 N. J.

but is granted on the special facts; and the court has a discretion to refuse to grant it in any case, when great mischiefs might

L. 511; *Van Anglen v. Bayonne*, 56 N. J. L. 463; *Frevert v. Bayonne*, 63 N. J. L. 202; *People's Inv. Co. v. State Assessors*, 66 N. J. L. 175. An act that proceedings on the sale of land for local improvements shall not be questioned collaterally, but may at any time be reviewed by *certiorari* or other proper proceeding in the supreme court, sustained: *State v. Jersey City*, 35 N. J. L. 381. And see *Smith v. Cleveland*, 17 Wis. 556. The writ will issue in the case of a warrant issued by a justice of the peace to collect militia penalties: *State v. Kirby*, 6 N. J. L. 143. In Maine *certiorari* is the proper remedy to correct errors of law in the action of county commissioners upon a complaint for the abatement of a tax: *Levant v. County Com'rs*, 67 Me. 429; *Wheeler v. County Com'rs*, 88 Me. 174. As to the general nature of the writ in New York, see *People v. Walter*, 68 N. Y. 403. The decisions in that state on the subject of the remedy by *certiorari* are very numerous, and in *People v. Betts*, 55 N. Y. 600, 602, they are reviewed by *Folger, J.*, in the following language: "The office of a common-law *certiorari* is, in strictness, merely to bring up the record of the proceedings of an inferior court or tribunal, to enable the court of review to determine whether the former has proceeded within its jurisdiction; and not to correct mere errors in its proceedings: *People v. Commissioners of Highways, etc.*, 30 N. Y. 72. True, it has been sometimes intimated, and sometimes held, that in the absence of any

other remedy, and to prevent a failure of justice, the party will be suffered by it to bring up, not only the naked question of jurisdiction, but the evidence, as well as the grounds or principles on which the inferior body acted, and the questions of law on which the relator relies: *Susquehanna Bank v. Supervisors, etc.*, 25 N. Y. 312; *Baldwin v. Buffalo*, 35 N. Y. 375; *Swift v. Poughkeepsie*, 37 N. Y. 511. Many cases are cited in *The People v. Assessors*, 39 N. Y. 81, and it is there held that the office of the writ extends to the review of all questions of jurisdiction, power, and authority of inferior tribunals to do the acts complained of, and to all questions of regularity of their proceedings. In *People v. Assessors*, 40 N. Y. 154, it is held that the writ may bring up for review the decision that a given state of facts is not legally sufficient to compel a board of assessors to the conclusion that certain property was not liable to assessment; in other words, a decision of law. See, also, *People v. Board, etc.*, 39 N. Y. 506; *Freeman v. Ogden*, 40 N. Y. 105; *People v. Hamilton*, 39 N. Y. 107; *Western R. R. Co. v. Nolan*, 48 N. Y. 513. In *People v. Delaney*, 49 N. Y. 655, inclining the other way, it was held that a departure by assessors from the statutory standard for estimating the value of property on the assessment roll cannot be corrected on *certiorari*. In *People v. Supervisors, etc.*, 51 N. Y. 442, it was held that it was the office of a *certiorari* to review the determinations of inferior boards where a

be likely to follow the setting aside the proceedings complained of.¹ It may even dismiss the writ after it has been granted,

claim was rejected as not just or legal. And in *People v. Allen*, 52 N. Y. 538, a *certiorari* brought up for review the decision of the defendants upon a question of law. It is thus seen that the office of a common-law writ of *certiorari* has been somewhat enlarged since the decision in 30 N. Y., *supra*. But it will also be seen that it is in cases where the relator has no other available remedy, and where injustice would be done if the writ was not permitted to do its work. The rule still remains unimpaired, at least in principle, that where there is a remedy by appeal, the writ will be confined to its original and more appropriate office: *Storm v. Odell*, 2 Wend. 287. See, also, *In re Mt. Morris Square*, 2 Hill 14, 27." To the foregoing may be added *People v. Nearing*, 27 N. Y. 306. Further as to the remedy by *certiorari* in tax cases in New York, see *People v. Tax Com'rs*, 91 N. Y. 593; *People v. New York Tax Com'rs*, 99 N. Y. 254; *People v. Assessors*, 104 N. Y. 377; *People v. Assessors*, 106 N. Y. 671; *People v. Carter*, 109 N. Y. 576; *People v. Christie*, 115 N. Y. 158; *People v. Parker*, 117 N. Y. 86; *People v. Carter*, 119 N. Y. 557, 654; *People v. Adams*, 125 N. Y. 471; *People v. Gilon*, 126 N. Y. 147; *People v. Wemple*, 129 N. Y. 543; *In re Corwin*, 135 N. Y. 245; *People v. Myers*, 135 N. Y. 465; *People v.*

Badgley, 138 N. Y. 314; *People v. Barker*, 139 N. Y. 55; *People v. Wemple*, 141 N. Y. 471; *People v. Tax Com'rs*, 144 N. Y. 483; *United States Trust Co. v. New York*, 144 N. Y. 488; *People v. Feitner*, 168 N. Y. 441; *In re Nisbet*, 3 App. Div. 171, 38 N. Y. Supp. 392; *People v. Valentine*, 5 App. Div. 520, 38 N. Y. Supp. 1087. In proceedings by a city to levy a tax for water bonds, no question as to the validity or regularity of the bonds can arise: *People v. Long Island City*, 76 N. Y. 720. In Michigan *certiorari* is not allowed in tax cases under the general laws: *Whitbeck v. Hudson*, 50 Mich. 86. But it is a common remedy to review proceedings in laying out drains and assessing the cost upon lands benefited, but the court will review upon it nothing but jurisdictional questions. The following are cases: *Kroop v. Forman*, 31 Mich. 144; *Strachan v. Brown*, 39 Mich. 168; *Lane v. Burnap*, 39 Mich. 736; *Taylor v. Burnap*, 39 Mich. 739; *Milton v. Drain Com'r*, 40 Mich. 229; *Whistler v. Drain Com'r*, 40 Mich. 541; *Willcheck v. Edwards*, 42 Mich. 105; *Dunning v. Drain Com'r*, 44 Mich. 518; *Wright v. Rowley*, 44 Mich. 557; *Lampson v. Drain Com'r*, 45 Mich. 150; *Reinig v. Munson*, 46 Mich. 138; *Van Buskirk v. Drain Com'r*, 48 Mich. 258; *Chapman v. Drain Com'r*, 49 Mich. 305; *Null v. Zierle*, 52 Mich. 540; *Whiteford v. Probate*

¹ In *Fractional School District v. The Joint Board*, 27 Mich. 3, the writ was refused when applied for to review the proceedings in establishing a school district, fifteen months after the action had

been taken; the district in the mean time having organized and taken upon itself corporate functions. See *Bird v. Perkins*, 33 Mich. 28.

without a consideration of the merits, if, in the opinion of the court, it was granted improvidently.¹ The writ must be applied for in due season, and before the proceeding, which it is desired to review, has passed beyond the control of the tribunal in which it was taken.² If, therefore, the writ is issued to review the action of assessors, after the assessment roll has passed from their hands into the hands of the supervisor, it will be dismissed for that reason.³ The writ is not awarded to review political action, and, therefore, the action of a town or any other municipality, or of any of the local boards, in deter-

Judge, 53 Mich. 130; *Burnett v. Scully*, 56 Mich. 374. There are many others. By statute, cases where the proceedings are susceptible of being corrected must be brought by regular suit into the circuit courts. See *Tucker v. Drain Com'r*, 50 Mich. 5. Proceedings in laying out highways are also reviewed on *certiorari*: See *People v. Highway Com'rs*, 14 Mich. 528; *Van Auken v. Highway Com'rs*, 27 Mich. 414; *Names v. Highway Com'rs*, 30 Mich. 490.

¹ *Magee v. Cutler*, 43 Barb. 239; *People v. Allegany Supervisors*, 15 Wend. 198; *Susquehanna Bank v. Broome Supervisors*, 25 N. Y. 312; *Matter of Lantis*, 9 Mich. 324. The writ should not be allowed where the purpose is merely to enable a party to recover back taxes paid by procuring a reversal of the proceedings: *People v. Commissioners of Taxes*, 43 Barb. 494; *People v. Reddy*, 43 Barb. 539.

² *State v. Board of Assessors*, 53 N. J. L. 319; *Stewart v. Hoboken*, 57 N. J. L. 330; *Carling v. Hoboken*, 64 N. J. L. 223; *Pompton Steel & Iron Co. v. Wayne T'p*, 65 N. J. L. 487. Where a public improvement has been fully completed, a *certiorari* attacking the preliminary proceedings comes too late: *State v. Rutherford*, 52

N. J. L. 499. Laches is not an absolute bar to relief against an assessment for a public improvement if there is legal provision for a re-assessment: *Frevort v. Bayonne*, 63 N. J. L. 202. As to the effect of laches in general, see *Lord's Petition*, 78 N. Y. 109; *People v. Carter*, 119 N. Y. 557, 654; *People v. Adams*, 125 N. Y. 471; *State v. Binninger*, 42 N. J. L. 528; *Matter of Lantis*, 9 Mich. 324. Petition for *certiorari* to review assessment proceedings had many years before held, in a peculiar case, not such laches as to bar relief: *Wood v. District of Columbia*, 6 Mackey 142.

³ *People v. Delaney*, 49 N. J. L. 655. See *People v. Queens Supervisors*, 1 Hill 195, 199. It was held in *People v. Adams*, 125 N. Y. 471; that the fact that the assessment rolls were in the tax-collector's possession when the writ of *certiorari* to correct them was issued to the village trustees was not material, as the statute did not require the original assessment rolls to be returned in answer to the writ. See *In re Corwin*, 135 N. Y. 245. As to the time for suing out the writ in New York, see, also, *People v. Assessors*, 104 N. Y. 377.

mining upon the purposes for which taxes shall be levied, or the time and manner of levying them, when that is committed to their judgment, or fixing upon the sums to be levied, or the objects of expenditure, or anything of a like nature, is not subject to review by means of it.¹ The writ will be refused where an appeal is given which affords an adequate remedy, or, in other words, which is not so restricted in its scope as to preclude the party from a review of the errors of which he complains.² So, also, where the law provides any other adequate remedy, the writ will be denied.³ It will not lie to re-

¹ *Benton v. Taylor*, 46 Ala. 388; *People v. Allegany Supervisors*, 15 Wend. 198. See *Dwight v. Springfield*, 4 Gray 107. *Certiorari* will not lie to review the determination by a board of supervisors that no special assessment is necessary; the determination being the exercise of a legislative, and not of a judicial function: *Brown v. Board of Supervisors*, 124 Cal. 274. Taxpayers of a city may, in the court's discretion, intervene by *certiorari* to prevent the expenditure of municipal funds under a void ordinance, where deficiencies in the funds must be made up by general taxation: *Publishing Co. v. Jersey City*, 54 N. J. L. 437. In *State v. Bell*, 91 Wis. 271, it was held that *certiorari* would lie to review the proceedings of a municipal organization in levying a tax.

² *State v. Southern Cotton Oil Co.*, 124 Ala. 523; *People v. Board of Com'rs*, 27 Colo. 86; *Witkowski v. Skalowski*, 46 Ga. 41; *Macklot v. Davenport*, 17 Iowa 379; *Peacock v. Leonard*, 8 Nev. 84, 154, 247; *State v. Bentley*, 23 N. J. L. 532; *State v. Apgar*, 31 N. J. L. 358. A party who neglects to appeal should not be given redress on *certiorari*: *State v. Snedeker*, 42 N. J. L. 76. One dissatisfied

with an assessor's valuation should appeal to the commissioners. If he does not, the supreme court, on *certiorari*, will not go into the question of valuation: *State v. Pownell*, 49 N. J. L. 169.

³ *State v. Twin Lakes (Minn.)*, 87 N. W. Rep. 925. The writ is not applicable to a case where the levying board was proceeding to levy a tax on an erroneous certificate that a tax had been voted: *Cattell v. Lowry*, 45 Iowa 478. When, in assessing upon abutting lots the expense of a local improvement, a jury is allowed on their demand to parties dissatisfied with the assessment, the demand for a jury is the proper remedy for an excessive assessment, and not *certiorari*: *Jones v. Boston*, 104 Mass. 461, citing *North Reading v. County Com'rs*, 7 Gray 109; and see *Whiting v. Boston*, 106 Mass. 89. But for the practice under charter in Jersey City, see *Walls v. Jersey City*, 55 N. J. L. 511. The amount of an assessment for a local improvement cannot be considered on an application for a *certiorari* to review the proceedings in making such assessment, but should be by a petition for an abatement: *Beals v. James*, 173 Mass. 591. *Certiorari* will not be allowed where there

view any merely discretionary action of any tribunal;¹ nor is it within the proper scope of the writ to review the decisions of inferior tribunals on the merits. The court awarding it, therefore, will not look into the evidence on which the inferior tribunal may have acted, except so far as may be necessary to the determination of any jurisdictional question that may depend upon it.² The proper office of the writ is to ascertain whether the inferior tribunal has acted in a case of which it had jurisdiction, and has lawfully exercised its jurisdiction in what it has assumed to do: to keep the inferior tribunal within the limits of the law, and not to make its judgments conform to the opinion of the superior tribunal on the facts.³

The following conclusions are deduced by the authorities from these general principles: That the writ does not lie to the collector of taxes or any other mere ministerial officer to review either his action or any of the prior action on which his own was based;⁴ that assessments cannot be revised and

has been an unauthorized increase in an assessment, the remedy at law being ample: *State v. Washoe County*, 15 Nev. 140. But see *State v. Springer*, 134 Mo. 212.

¹ The auditor-general's action in charging back certain taxes to a county in his settlement with it, being within his official discretion, is not reviewable on *certiorari*: *Midland Supervisors v. Auditor-General*, 27 Mich. 165.

² *Matter of Mount Morris Square*, 2 Hill 14, 27, per *Cowen*, J., citing *Rex v. Moreley*, 2 Burr. 1040, 1042; *Philadelphia & T. R. Co.*, 6 Whart. 25, 41. And see *Central Pac. R. Co. v. Placer County*, 43 Cal. 365; *Low v. Galena*, etc. R. Co., 18 Ill. 324; *Commissioners v. Carthage Supervisors*, 27 Ill. 140; *Jackson v. People*, 9 Mich. 111; *Caron v. Martin*, 26 N. J. L. 594; *State v. Pownell*, 49 N. J. L. 169; *Swift v. Poughkeepsie*, 37 N. Y. 511; *People v. Brooklyn Assessors*, 39 N. Y. 81;

People v. Albany Assessors, 40 N. Y. 154; *Gaertner v. Fond du Lac*, 34 Wis. 497.

³ *Certiorari* is a proper remedy to annul an increased tax assessment if made without jurisdiction: *State v. Springer*, 134 Mo. 212.

⁴ *Insurance Co. v. Bonner*, 24 Colo. 220; *Murphy v. Board of Com'rs (Idaho)*, 59 Pac. Rep. 715; *People v. Queens Supervisors*, 1 Hill 195. In the Idaho case the act sought to be reviewed was the noting of a change ordered upon an assessment roll by the board of equalization. The New York case was one in which counsel moved for a *certiorari*, prohibition, *mandamus*, "or some other writ, instrument, process, order, or proceeding," to review the action of town auditors in allowing a large sum against the town, for the expense of certain suits which it was claimed were not a proper charge against it. The errors complained of all originated in this

set aside on this writ on the ground merely that they are excessive or unequal;¹ or that the assessors have erred in any matter of judgment, or have been guilty of irregularities in the exercise of their authority, not being of a nature to deprive them of jurisdiction or to take from the party complaining any substantial right.² The discretionary action of a county board in equalizing the assessments of the county, like the assessments themselves, is not subject to review on this process.³ In the following cases action may be set aside on

allowance. The tax roll was at the time in the collector's hands, and the court held that no relief could be given in any of the modes proposed.

¹ *Randle v. Williams*, 18 Ark. 380; *Jones v. Boston*, 104 Mass. 461; *State v. Kingsland*, 23 N. J. L. 85; *State v. Ross*, 23 N. J. L. 517; *State v. Danser*, 23 N. J. L. 552; *State v. Powers*, 24 N. J. L. 400; *State v. Manchester*, 25 N. J. L. 531; *Owners of Ground v. Albany*, 15 Wend. 374; *People v. Ogdensburg*, 48 N. Y. 390. In New York, by statute, an aggrieved taxpayer is authorized to procure a review by *certiorari* of an unequal assessment: See *In re Corwin*, 135 N. Y. 245; *People v. Badgley*, 138 N. Y. 314.

² *Moore v. Turner*, 43 Ark. 243; *Wheeler v. County Com'rs*, 88 Me. 174; *Jones v. Boston*, 104 Mass. 461; *Newark ads. State*, 32 N. J. L. 453; *State v. Newark*, 32 N. J. L. 491; *Matter of Mount Morris Square*, 2 Hill 14; *People v. Fredricks*, 48 Barb. 173. An assessment for a completed sewer will not be set aside on *certiorari* where the charter was substantially complied with, and where the relator knowingly remained silent during the construction of the work: *State v. La Crosse*, 101 Wis. 208. If a corporation, in opening a street

and assessing the expense, acts within the scope of the authority conferred upon it, and complies with the forms prescribed by the statute, the proceedings will not be reversed on *certiorari*, though its own by-laws may have been disregarded: *Ex parte Mayor, etc. of Albany*, 23 Wend. 277. An assessment will not be set aside because of its including property not taxable with that which is, if the whole valuation is not excessive for that which is taxable: *State v. Haight*, 35 N. J. L. 178. *Certiorari* to review special assessment proceedings is not granted because of a fault in the construction of the improvement which was remedied before the writ was asked for: *Beals v. James*, 173 Mass. 591. On *certiorari* to review a tax assessment the taxpayer cannot complain of an assessment which was founded on *data* furnished by himself, nor can he attack the assessment on general grounds: *Shelby County v. Mississippi & T. R. Co.*, 16 Lea 401.

³ *Smith v. Jones County Supervisors*, 30 Iowa 531; *Polk County v. Des Moines*, 70 Iowa 351; *State v. Ellis*, 15 Mont. 224; *People v. Allegany Supervisors*, 15 Wend. 198; *People v. Queens Supervisors*, 1 Hill 195. Irregularity in the exercise of a rightful power

certiorari: Where the assessment is erroneous in point of law, either because the assessors have adopted some inadmissible basis in making it, or because they have disregarded any of the mandatory provisions of statute on which parties assessed have a right to rely for their protection;¹ where errors of a like

by a board of equalization will not be reviewed on *certiorari*: *Murphy v. Lincoln County Com'rs* (Idaho), 59 Pac. Rep. 715.

¹ *State v. Dunn* (Minn.), 90 N. W. 772. See *Newburyport v. County Com'rs*, 12 Met. 211 (where the question was whether the commissioners were not legally bound to assess at the valuation which the taxpayer had given in the list which he had furnished as required by law): *Wheeler v. County Com'rs*, 88 Me. 174 (where, on a complaint for the abatement of taxes, the commissioners erred in matters of law); *Heywood v. Buffalo*, 14 N. Y. 534; *People v. Com'rs of Taxes*, 23 N. Y. 224; *Hatch v. Buffalo*, 38 N. Y. 276; *People v. Ogdensburg*, 48 N. Y. 390 (where it was held that while valuations are not subject to review on *certiorari*, if the assessors enter on the roll property not subject to taxation, and refuse on application to strike it out, the action may be reviewed in this mode. *Mandamus* would seem, however, to be a more appropriate remedy); *Western R. Corp. v. Nolan*, 48 N. Y. 513; *Kennedy v. Troy*, 77 N. Y. 493; *Genesee, etc. Bank v. Livingston County*, 53 Barb. 223; *Farmington River Water Power Co. v. Berkshire County*, 112 Mass. 206; *Hittinger v. Boston*, 139 Mass. 17; *Bowditch v. Superintendent of Streets*, 168 Mass. 239; *State v. Clothier*, 30 N. J. L. 351 (where it is held that *certiorari* may be brought though the tax has been

collected by distress and sale. But see, as to this, *National Bank v. Elmira*, 53 N. Y. 49; *Ohio, etc. R. Co. v. Lawrence County*, 27 Ill. 50; *State v. McClurg*, 27 N. J. L. 253 (where it is decided that if an excessive tax is assessed it will be set aside for the excess only); *State v. Quaife* (where a similar ruling was had); *State v. Newark*, 27 N. J. L. 185 (where, on *certiorari*, an assessment was set aside which assumed to be made by benefits, where, from the nature of the case, there could be no benefits); *Frevort v. Bayonne*, 63 N. J. L. 202 (where an assessment clearly proved to exceed the benefits conferred on the property by the improvement was set aside on this writ); *State v. Paterson*, 47 N. J. L. 15 (where, at suit of an individual, municipal improvement proceedings were set aside for failure to give statutory notice); *State v. Howland*, 48 N. J. L. 425 (where a plain violation of a tax assessor's official duty, appraising personalty at one-third of its full value was corrected on *certiorari*); *Earles v. Ramsay*, 61 N. J. L. 194 (where *certiorari* was held to be a proper remedy for relief where the property assessed for the purpose of taxation has no existence whatever); *Rasell v. Buck*, 62 N. J. L. 575 (where it was said that when an assessor fails to allow a deduction to which a taxpayer is entitled upon the admitted facts, the court will intervene by *certiorari* to relieve him); *Wood v. District of Colum-*

character are committed by any appellate jurisdiction which is empowered by statute to review, revise, or equalize the assessments,¹ and where municipal bodies in levying assessments for local improvements exceed their authority, or lay down erroneous principles to govern the action of the assessors or commissioners who are to make them.²

bia, 6 Mackey 142 (where it is held that where an invalid tax is sought to be imposed, *certiorari* is the proper remedy to review the proceedings); Carroll v. Mayor, 12 Ala. 173; Ex parte Buckner, 4 Eng. (Ark.) 73; California, etc. R. Co. v. Butte Supervisors, 18 Cal. 671; Swann v. Cumberland, 8 Gill 150; Kelso v. Boston, 120 Mass. 297 (where it is said that the omission from an assessment of some of the parties benefited may be corrected on this writ); Stone v. Viele, 38 Ohio St. 314; State v. Dunn (Minn.), 90 N. W. Rep. 722 (where it is said that *certiorari* lies—no appeal or other remedy being provided—to review the determination of the state auditor as to the county in which personalty is taxable); State v. Springer, 134 Mo. 212 (where this writ is held to be a proper remedy to review an increase of the assessment of personal property when made without jurisdiction).

¹ Royce v. Jenny, 50 Iowa 676; Remey v. Burlington City Council, 80 Iowa 470; State v. Lawler, 103 Wis. 460. See Louisville, etc. R. Co. v. Bate, 12 La. 673. In New York, where street assessments were to be submitted to the common council for confirmation, and that body was empowered to alter the same in such manner as, in its opinion, justice might require, the act of confirmation was held to be an exercise of judicial authority, and subject to be removed into

the supreme court by *certiorari*: Leroy v. New York, 20 Johns. 430; Starr v. Rochester, 6 Wend. 564; Matter of Mount Morris Square, 2 Hill 14; People v. New York, 5 Barb. 43; People v. Brooklyn, 9 Barb. 535. So in Massachusetts, the proceedings of county commissioners in reviewing assessments on appeal were held reviewable in this mode: See Parks v. Boston, 8 Pick. 218; Gibbs v. County Com'rs, 19 Pick. 298; Newburyport v. County Com'rs, 12 Met. 211; Lincoln v. Worcester, 8 Cush. 55, 61. A similar ruling in New Jersey: State v. Falkinburge, 15 N. J. L. 320; State v. Parker, 34 N. J. L. 49. And in Missouri: State v. St. Louis County Court, 47 Mo. 594; State v. Dowling, 50 Mo. 134. And see Floyd v. Gilbreath, 27 Ark. 675.

² *Certiorari* is a proper remedy to test the question whether an assessment for a sewer is invalid for any reason disclosed by the record, or because the statute is unconstitutional: Holt v. City Council, 127 Mass. 408; Bowditch v. Superintendents, 168 Mass. 239; Boston v. Boston & A. R. Co., 170 Mass. 95; Weed v. Boston, 172 Mass. 28. Questions as to the constitutionality of a statute providing for local improvements, and as to compliance by the authorities with the terms of such statute, must be raised in Massachusetts by *certiorari*: Taber v. New Bedford, 135 Mass. 162; Snow

When the relief sought by the applicants for *certiorari* would affect all other taxpayers and residents of a town equally with themselves in arresting the collection of a tax alleged to be illegal, it has been held that the writ should be denied unless applied for by all.¹ On the other hand there must be a common grievance to warrant any joining of prosecutors who are not co-owners of property.²

In reviewing a case on *certiorari* the court is confined to the

v. Fitchburg, 136 Mass. 179. In Alabama a question as to the constitutionality of a paving assessment was held to be properly raised in the proceeding to enforce such assessment, and not by *certiorari*: City Council v. Birdsong, 126 Ala. 632. Where there are questions of jurisdiction in the appointment of commissioners to make the assessment, *certiorari* will lie: Patchin v. Brooklyn, 13 Wend. 664. Where a property owner claims that he has been aggrieved by a street assessment, and there is no provision by statute or ordinance for reviewing the council's proceedings, *certiorari* is the proper remedy to test the validity of the assessment: Wilson v. Seattle, 2 Wash. 543. Although a city charter provided that when the district court made an order confirming an assessment of the board of public parks for local improvements, the assessment roll and all things contained therein should be *res adjudicata*, and no appeal should lie from the assessment, yet the proceedings, it was held, could be reviewed on *certiorari*: Sherwood v. District Court, 40 Minn. 22. In New Jersey it is said that the action of municipal bodies in levying assessments for local improvements must be kept strictly within the limits assigned to them by the statute, and if the assessments ap-

pear not to be within those limits, they shall not only be liable to reversal on *certiorari*, but also be held void and insufficient to support a title professing to be founded on them: State v. Jersey City, 35 N. J. L. 381; State v. Hudson City, 29 N. J. L. 104, 475. On *certiorari* to review the assessment for a street improvement, general reasons which do not state any specific defect or error in the proceedings will not be regarded by the court: Simmons v. Passaic, 55 N. J. L. 485. An order dismissing a *certiorari* to review an assessment is not conclusive as to the validity of the assessment: Peeple v. Kingston, 101 N. Y. 82.

¹ Libby v. West St. Paul, 14 Minn. 248.

² Potter v. Orange, 62 N. J. L. 192. Taxpayers of different townships cannot join in *certiorari* to set aside different taxes for the same general purpose when the objections raised are not common to all the taxes; Woodworth v. Gibbs, 61 Iowa 398. The judgment of the court of county commissioners increasing the valuation of property as assessed for taxation is a separate and distinct judgment as to each taxpayer; and *certiorari* will not be awarded to bring up for review, jointly, judgments involving different rights: Carter v. Cullman County Com'rs, 80 Ala. 394.

record of the tribunal reviewed. Extrinsic evidence cannot be received to contradict or control it unless the statute has made provision therefor.¹ If the tax is rendered illegal by facts not appearing of record, some other remedy must be sought.² On *certiorari* the court will not set aside the whole of a tax proceeding if justice can be done to the party without doing so,³ unless, perhaps, where by law, in case it is vacated, there can be a new assessment; in which case vacating the whole may be most likely to accomplish the general purposes of the law for making the levy.⁴

Remedy by writ of error. A proceeding in error is in the nature of an appeal; it in fact involves appellate jurisdiction; and on such proceeding "a court can only review the judgment of a court."⁵ Therefore the writ is not available for the correction of errors or mistakes in ministerial action. Thus it will not lie to review the doings of a county auditor under a statute which authorizes him to make additions to the valuation of property returned for taxation. In making such additions he does not "act as a judge . . ." he does not act judicially within the meaning of the constitution that all judicial power is conferred on its courts. He acts simply as an agent of the state in the valuation and assessment of the property of the citizen for taxation." The remedy of the individual for errors or mistakes in such cases is by injunction.⁶

¹ *People v. Board of Com'rs*, 27 Colo. 86; *Charlestown v. County Com'rs*, 109 Mass. 270. See *Hannibal, etc. R. Co. v. State Board*, 64 Mo. 294; *Hatch v. Buffalo*, 38 N. Y. 276. In *People v. Smith*, 24 Hun 66, it is said that the return by statute is not conclusive, and that there may be a reference to take testimony.

² *Taylor v. Louisville & N. R. Co.*, 88 Fed. Rep. 350, 31 C. C. A. 537; *Floyd v. Gilbreath*, 27 Ark. 675; *Vance v. Little Rock*, 30 Ark. 435; *State v. Manning*, 41 N. J. L. 275; *Hatch v. Buffalo*, 38 N. Y. 276; *Shelby County v. Mississippi & T. R. Co.*, 16 Lea 401.

³ *State v. Kingsland*, 23 N. J. L. 85, citing *King v. King*, 2 T. R. 235; *Lawton v. Com'rs*, 2 Caines 182. See *Simmons v. Passaic*, 55 N. J. L. 485.

⁴ *State v. Bergen*, 34 N. J. L. 438. But whether, on *certiorari*, the court will set aside an assessment after an act of the legislature to confirm it, even though that act be invalid, see *State v. Apgar*, 31 N. J. L. 358.

⁵ *Musser v. Adair*, 55 Ohio St. 466.

⁶ *Musser v. Adair*, 55 Ohio St. 466.

Equitable relief. *The general rule.* It is not a matter of right that a person should have relief in equity on a showing of illegality or nullity in tax proceedings, unless he can show in addition that his case comes under some acknowledged head of equity jurisdiction. The mere fact that the law has been or is about to be violated, even when the violation is accompanied with a threat to proceed against the party to enforce an unlawful levy, will not of itself furnish any ground for equitable interposition.¹ In ordinary cases a party must find his

¹ *Dows v. Chicago*, 11 Wall. 108; *Hannewinkle v. Georgetown*, 15 Wall. 547; *State Railroad Tax Cases*, 92 U. S. 575; *Snyder v. Marks*, 109 U. S. 189; *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516; *Milwaukee v. Kaeffer*, 116 U. S. 219; *Shelton v. Platt*, 139 U. S. 591; *Pacific Express Co. v. Seibert*, 142 U. S. 339; *Ogden City v. Armstrong*, 168 U. S. 224; *Pittsburgh, etc. R. v. Board of Public Works*, 172 U. S. 32; *Arkansas B. & L. Assoc. v. Madden*, 175 U. S. 269; *Robinson v. Wilmington*, 25 U. S. App. 144; *Union Pac. R. Co. v. Lincoln County*, 2 Dill. 297; *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 26 Fed. Rep. 11; *Western Union Tel. Co. v. Poe*, 61 Fed. Rep. 449; *Taylor v. Louisville & N. R. Co.*, 88 Fed. Rep. 350; *Bank of Kentucky v. Stone*, 88 Fed. Rep. 383; *Weaver v. State*, 39 Ala. 535; *Elyton Land Co. v. Ayres*, 62 Ala. 414; *Mayor, etc. v. Rains*, 107 Ala. 691; *Floyd v. Gilbreath*, 27 Ark. 675; *Savings & L. Soc. v. Austin*, 46 Cal. 416; *Insurance Co. v. Bonner*, 24 Colo. 220; *Highlands v. Johnson*, 24 Colo. 371; *Cook County v. Chicago, etc. R. Co.*, 35 Ill. 460; *Ayers v. Widmayer*, 188 Ill. 121; *Laird v. Pine County*, 72 Minn. 409; *McDonald v. Murphree*, 45 Miss. 705; *Sayre v. Tompkins*, 23 Mo. 443; *First Nat. Bank v. Meredith*, 44 Mo. 500; *Barrow v.*

Davis, 46 Mo. 394; *McPike v. Pew*, 48 Mo. 525; *Moers v. Smedley*, 6 Johns. Ch. 27; *Heywood v. Buffalo*, 14 N. Y. 534; *Susquehanna Bank v. Broome County*, 25 N. Y. 312; *Messeck v. Supervisors*, 50 Barb. 190; *Hanlon v. Supervisors*, 57 Barb. 383; *Delaware & H. Canal Co. v. Atkins*, 48 Hun 456; *Postal Telegraph Cable Co. v. Grant*, 58 Hun 603; *United Lines Tel. Co. v. Grant*, 63 Hun 634; *Farrington v. Investment Co.*, 1 N. D. 102; *Oregon, etc. Nat. Bank v. Jordan*, 16 Or. 113; *Williams v. Grant County Court*, 26 W. Va. 488; *Blue Jacket Consol. Copper Co. v. Scherr*, 51 W. Va. (40 S. E. Rep. 514). This doctrine is applicable to the case of special assessments: *Dean v. Davis*, 51 Cal. 406; *Wilson v. Philippi*, 39 W. Va. 75; *Wells v. Western Paving, etc. Co.*, 96 Wis. 116. A bill by railroad companies to enjoin a board created by a statute alleged to be unconstitutional from the assessing of complainant's property for taxation, presents a case of equitable cognizance: *Union Pac. R. Co. v. Alexander*, 113 Fed. Rep. 347. Where railroad property is only subject to taxation under a state assessment, a tax based on a county assessment will be enjoined: *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 16. Where a tender made of state obligations which by

remedy in the courts of law,¹ and it is not to be assumed that he will fail to find one entirely adequate to his proper relief; nor will equity interfere at the instance of one who has neglected to invoke his legal and statutory remedies.² But there

law are receivable for taxes has been refused, collection will be enjoined: *Allen v. Railroad Co.*, 114 U. S. 311. An injunction will not lie to restrain the collection of part of an assessment on the ground that the money is not actually needed for the payment of bonds or interest: *Florer v. McAffee*, 135 Ind. 540. An injunction will not be awarded merely because the officer, in collecting, is proceeding in a mode not the most equitable, if he is only doing what the statute permits. As where he is enforcing the mortgager's tax against the mortgagee: *People's Savings Bank v. Tripp*, 13 R. I. 621. Equity will not relieve on the ground of an illegal tax collected of complainant in former years: *Fremont v. Mariposa County*, 11 Cal. 361. See *McIntosh v. People*, 93 Ill. 540. Injunction will not lie to restrain collection of a legal railroad-aid tax, because of the company's insolvency, or because no order has been made to collect for the purpose of appropriating the tax to railroad aid: *Wilson v. Hamilton County*, 68 Ind. 507.

¹ "In tax cases the rule is firmly settled that special facts must be inserted in the bill or complaint calling for equitable relief, and where none such are averred the suitor will be relegated to his legal remedies:" *Schaffner v. Young* (N. D.), 86 N. W. Rep. 733, citing *Linehan R. T. Co. v. Pendergrass*, 70 Fed. Rep. 1, 16 C. C. A. 585, 36 U. S. App. 48, and other cases. In a proceeding in equity the objec-

tion that there is a plain and adequate remedy at law is jurisdictional, and a bill for injunction must be dismissed where such a remedy exists, notwithstanding the objection is not raised by the defendant either by plea, demurrer, or answer: *Hoey v. Coleman*, 46 Fed. Rep. 221.

² See *Magee v. Denton*, 5 Blatch. 130; *Dundee Mort.-Trust Inv. Co. v. Charlton*, 32 Fed. Rep. 192; *Bank of Kentucky v. Stone*, 88 Fed. Rep. 383; *Douglas County v. Stone*, 110 Fed. Rep. 812; *Weaver v. State*, 39 Ala. 535; *Boyd v. Selma*, 96 Ala. 144; *Campbell v. Bashford* (Ariz.), 16 Pac. Rep. 269; *Pulaski County Equal. Board Cases*, 49 Ark. 518; *Lent v. Tilson*, 72 Cal. 404; *Breeze v. Haley*, 10 Colo. 5; *Dodd v. Hartford*, 25 Conn. 232; *Camp v. Simpson*, 118 Ill. 224; *Beldler v. Kochersperger*, 171 Ill. 563; *Kochersperger v. Larned*, 172 Ill. 86; *Smith v. Kochersperger*, 180 Ill. 527; *White v. Raymond*, 188 Ill. 298; *Coxe Bros. & Co. v. Salomon*, 188 Ill. 571; *Dunkle v. Herron*, 115 Ind. 470; *Jones v. Cullen*, 142 Ind. 335; *Alley v. Lebanon*, 146 Ind. 125; *Taylor v. Crawfordsville*, 155 Ind. 403; *Senour v. Mitchell*, 140 Ind. 636; *Harris v. Fremont County*, 63 Iowa 639; *Bogaard v. Independent Dist.*, 93 Iowa 269; *Missouri River, etc. R. Co. v. Wheaton*, 7 Kan. 232; *Miller v. Madden*, 35 Kan. 455; *Baldwin v. Shine*, 84 Ky. 502; *Bell County Coke, etc. Co. v. Board of Trustees* (Ky.), 42 S. W. Rep. 92; *Kelley v. Barton*, 174 Mass. 396; *Nelson v. Saginaw*, 106 Mich. 659;

are certain cases with which the courts of law cannot adequately deal. Their preventive remedies are few and of narrow scope; and where the case is such that if threatened action is

Bogert v. Jackson Circuit Judge, 118 Mich. 457; *Albrecht v. St. Paul*, 47 Minn. 351; *Kelly v. Minneapolis*, 57 Minn. 294; *Ward v. Board of Com'rs*, 12 Mont. 23; *Cosier v. McMillan*, 22 Mont. 484; *Deloughrey v. Hinds*, 23 Mont. 260; *Baldwin v. Elizabeth*, 42 N. J. Eq. 11; *Jamaica & B. R. Co. v. Brooklyn*, 123 N. Y. 375; *Hilliard v. Asheville*, 118 N. C. 845; *Haff v. Fuller*, 45 Ohio St. 495; *Lewis v. Laylin*, 46 Ohio St. 663; *Duck v. Peeler*, 74 Tex. 268; *Swenson v. McLaren*, 2 Tex. Civ. App. 331; *Buffalo v. Pocahontas*, 85 Va. 222; *Boorman v. Juneau County*, 76 Wis. 550. If the statutory remedy is lost by negligence, equity will not interfere: *Wilkerson v. Walters*, 1 Idaho (N. S.) 564. An owner will not be entitled to relief because both he and the taxing power were ignorant that the time for which the property had been released from taxes had not expired: *Du Bignon v. Brunswick*, 106 Ga. 317. Where a bill seeks relief which a board of review might have given, some excuse must be shown for not obtaining it there: *Johnson v. Roberts*, 102 Ill. 655. If one who, having property listed on an assessment roll, is "interested" in an equalization board's proceedings, so that he has a right to appear before the board, but fails to do so, he cannot have an injunction against the collection of the tax, whether his grievance is an overvaluation of his own property, or an undervaluation of other property: *Dundee Mort.-Trust Inv. Co. v. Charlton*, 32 Fed. Rep. 192. Courts will not

interfere with the action of the county assessor and board of equalization where it does not appear but that the assessor acted honestly and fairly, or that plaintiff did not have a hearing: *Danforth v. Livingston*, 23 Mont. 558. The failure of the board of review to afford a taxpayer opportunity to show that his property had been overvalued by the assessor is not ground for enjoining the collection of the tax; there being an adequate legal remedy by *mandamus* against the board: *White v. Raymond*, 188 Ill. 298. See *Martin v. Barnett*, 188 Ill. 288; *Coxe Bros. & Co. v. Salomon*, 188 Ill. 571. Property owners who, by appearing and filing objections when a report was made with the view of charging their property with the cost of an improvement, have accepted the remedy given by law, are not entitled to the remedy by injunction: *De Puy v. Wabash*, 133 Ind. 336. Equity has no jurisdiction to enjoin a sale for a delinquent sidewalk assessment, on the ground that the public had not acquired title to the land on which the walk was laid; an adequate remedy at law being provided in the summary hearing of defenses to the application for judgment: *Boynton v. People*, 159 Ill. 553. Equity will not enjoin the enforcement of a municipal lien for an improvement, and decree cancellation on the ground that the illegal front-foot rule was adopted, where the work was done, the property benefited, and no offer made by complainant to contribute to the cost; the party

allowed to be taken the mischief will be irremediable, equity, under old and well-established principles, will interfere, because equity alone can do complete justice under such circumstances.¹ Equity may also intervene to prevent a multiplicity of suits;² and cases of fraud, accident, or mistake, and cases of cloud upon the title to one's property, are also cases with which equity can most effectively deal, and it takes jurisdiction in tax cases as it does in all others where any one of these grounds of jurisdiction exists.³ Where the case is one of equi-

will be left to his defenses at law: *Pittsburgh's Appeal*, 118 Pa. St. 458. A statute requiring all taxpayers who desire to claim that there has been error either in the description or valuation of the property assessed, to appear before the board of assessors and commence suit for redress only in the manner therein prescribed, does not preclude one who complains of error in the proportion of the property assessed from seeking an injunction of the collection of taxes illegally assessed: *Pullman's Palace-Car Co. v. Board of Assessors*, 55 Fed. Rep. 206. Where the jurisdiction of the board of equalization extends only to questions of valuation, it is not necessary for one who seeks to enjoin the collection of an illegal tax to show that he first applied to the board for relief: *Davis v. Burnett*, 77 Tex. 3. A statute providing that no special tax for a local improvement shall be set aside for irregularity, and that any person aggrieved by such tax may pay the same under protest and sue for recovery, held not applicable to cases where the assessment is void for want of jurisdiction to order the improvement. In such case resort may be had to equity: *Armstrong v. Ogden City*, 12 Utah 476. It was held in

California & O. Land Co. v. Gowen, 48 Fed. Rep. 771, that as the board of equalization is part of the machinery for the assessment of property for taxation, one who asks it to reduce an alleged overvaluation does not thereby elect to pursue a remedy at law for such overvaluation, or for an illegal or a fraudulent assessment, if it be such, so as to preclude his applying afterwards to have the collection of the tax restrained in equity. Failure to appeal to the city council to correct irregularities which render absolutely void an assessment under the street improvement act, held not to preclude an injunction against the assessment, for in such a case no appeal could have afforded relief: *Chase v. City Treasurer*, 122 Cal. 540. And see *ante*, p. 1389.

¹ The removal of a building from a town will not be enjoined at the suit of the taxpayers of the town on the ground that the town is heavily indebted, and that such removal will increase the burden of taxes on the remaining residents: *St. Lawrence v. Gross*, 12 S. D. 350.

² See *post*, pp. 1428-1432.

³ See *post*, pp. 1447-1461. It is held in Arkansas that an assessment by the railroad commissioners cannot be set aside in equity

table jurisdiction the court may give relief as to the whole case, though as to some part of it there would be remedy at law.¹

Personal taxes. When a tax as assessed is only a personal charge against the party taxed, or against his personal property, it is difficult in most cases to suggest any ground of equitable jurisdiction. Presumptively the remedy at law is adequate. If the tax is illegal and the party makes payment, he is entitled to recover back the amount. The case does not differ in this regard from any other case in which a party is compelled to pay an illegal demand; the illegality alone affords no ground for equitable interference, and the proceedings to enforce the tax by distress and sale can give none, as these only constitute an ordinary trespass. To this point the decisions are numerous.² The exceptions to this rule, if any, must

except for fraud or mistake in the mode of assessment: *Wells, Fargo & Co.'s Express v. Crawford County*, 63 Ark. 576. In Illinois it is said that equity will interfere to enjoin the collection of a tax only when the tax is unauthorized by law, or is laid on property not subject to taxation, or where the assessment or levy has been made without legal authority, or fraud has intervened: *Wabash, etc. R. Co. v. Johnson*, 108 Ill. 11, citing *Cook County v. Railroad Co.*, 35 Ill. 466; *Porter v. Railroad Co.*, 76 Ill. 596, and *National Bank v. Cook*, 77 Ill. 622; *Illinois Central R. Co. v. Hodges*, 113 Ill. 323; *Heinroth v. Kochersperger*, 173 Ill. 205; *Earl v. Raymond*, 188 Ill. 15; *White v. Raymond*, 188 Ill. 298. See *Exchange Bank v. Miller*, 19 Fed. Rep. 372. In *Clee v. Sanders*, 74 Mich. 692, it was said that the fact that a tax invalid because levied to cover an appropriation for private purposes had been so covered up in the assessment roll as not to show its identity was an additional reason for equitable interference.

¹ *Hebard v. Ashland County*, 55 Wis. 145.

² *Dows v. Chicago*, 11 Wall. 108; *Hannewinkle v. Georgetown*, 15 Wall. 547; *Pullman Palace Car Co. v. Twombly*, 29 Fed. Rep. 658; *Robinson v. Wilmington*, 65 Fed. Rep. 856, 13 C. C. A. 177, 25 U. S. App. 144; *Linehan R. T. Co. v. Pendergrass*, 70 Fed. Rep. 1, 16 C. C. A. 585, 36 U. S. App. 48; *Ritter v. Patch*, 12 Cal. 298; *Berri v. Eaton*, 98 Mass. 469; *Loud v. Haley*, 10 Colo. 5; *Dodd v. Hartford*, 25 Conn. 232; *Baldwin v. Tucker*, 16 Fla. 258; *Odin v. Woodruff*, 31 Fla. 160; *Williams v. Dutton*, 184 Ill. 608; *Baltimore v. Railroad Co.*, 21 Md. 50; *Brewer v. Springfield*, 97 Mass. 152; *Durant v. Eaton*, 98 Mass. 469; *Loud v. Charlestown*, 99 Mass. 208; *Whiting v. Boston*, 106 Mass. 89; *Hunnewell v. Charlestown*, 106 Mass. 350; *Clark v. Worcester*, 167 Mass. 81; *Williams v. Detroit*, 2 Mich. 560; *Youngblood v. Sexton*, 32 Mich. 406; *Hagenbuch v. Howard*, 34 Mich. 1; *St. Johns Nat. Bank v. Bingham T'p*, 113 Mich. 203; *Clark v. Ganz*, 21 Minn. 387; *Bra-*

be of cases which are to be classed under the head of irreparable injury; as when the enforcement of a tax might destroy

dish v. Lucken, 38 Minn. 186; Laird, etc. Co. v. Pine County, 72 Minn. 409; Deane v. Todd, 22 Mo. 90; Sayre v. Tompkins, 23 Mo. 443; Lockwood v. St. Louis, 24 Mo. 20; Fowler v. St. Joseph, 37 Mo. 228; Barrow v. Davis, 46 Mo. 394; Hopkins v. Lovell, 47 Mo. 102; Leslie v. St. Louis, 47 Mo. 474; McPike v. Pew, 48 Mo. 525; Conley v. Chedic, 6 Nev. 222; Savings Bank v. Portsmouth, 52 N. H. 17; Brown v. Concord, 56 N. H. 375; Rockingham Savings Bank v. Portland, 62 N. H. 17; Delaware & H. C. Co. v. Atkins, 48 Hun 456; Worth v. Fayetteville, Winst. Eq. (N. C.) 70; Schaffner v. Young (N. D.), 86 N. W. Rep. 733; Minneapolis, St. P. & S. S. M. R. Co. v. Dickey County (N. D.), 90 N. W. Rep. 260; McCoy v. Chillicothe, 3 Ohio 570; Greene v. Mumford, 5 R. I. 472; White v. Stender, 24 W. Va. 615; Van Cott v. Milwaukee Supervisors, 18 Wis. 247. The doctrine of these cases is very succinctly stated by *Bigelow*, Ch. J., in *Brewer v. Springfield*, 97 Mass. 152, 154. "Until the plaintiffs have been compelled to pay the tax which they allege to have been illegally assessed upon them, they have suffered no wrong. When they have paid it they can recover it back by an action at law, which would furnish them an adequate and complete remedy." See, also, *Brooklyn v. Messerole*, 26 Wend. 132. It was decided in *Allen v. Pullman's Palace-Car Co.*, 139 U. S. 658, that the sale of a sleeping-car company's property to collect a privilege tax or license would not be restrained on the ground of the

unconstitutionality of the tax, where no independent ground of equity jurisdiction was shown, and where the consequences sought to be prevented might be avoided, under the state statute, by paying the tax under protest and suing to recover it back. And it was held in *Oregon Short Line & U. U. R. Co. v. Standing*, 10 Utah 452, that the collection of an illegal tax by sale of a railroad company's cars would not be enjoined on the ground that a cloud would thereby be cast upon the company's realty, though it did not affirmatively appear that the cars were sufficient in value to pay the tax, the presumption being always that a levy is sufficient to satisfy the demand. In Connecticut, taxes on real and personal estate are held to stand on the same footing. See *Rowlan v. School Dist.*, 42 Conn. 30. In Illinois, if a person is assessed for personalty in one town when his domicile is in another, he may enjoin the tax: *Sivwright v. Pierce*, 108 Ill. 133; *Halstead v. Adams*, 108 Ill. 609. But a citizen who has continuously evaded just taxation cannot obtain relief in equity from a personal tax in one county because he should have been taxed in another in which it was admitted he had not paid any tax: *Williams v. Dutton*, 184 Ill. 608. In South Dakota the owner of cattle assessed in different counties for the same year is entitled, if he has paid the taxes thereon in the county of his residence, to an injunction restraining the collection of the tax assessed in another county, and he need not first present to the state auditor the ques-

a valuable franchise,¹ or might embarrass an assignee or receiver in the execution of his trust;² or when property is levied upon which possesses a peculiar value to the owner beyond any possible market value it can have;³ and other like cases, where the recovery of damages would be inadequate redress. A case would be exceptional, also, if under the law no remedy could be had to recover back moneys paid.⁴

tion as to which was the proper county for assessment: *Knapp v. Charles Mix County*, 7 S. D. 399. In Nebraska the collection of personal taxes by distress will be restrained when the assessment was without jurisdiction: *Rothwell v. Knox County (Neb.)*, 86 N. W. Rep. 903. In the state of Washington injunction lies to restrain the sale of personalty for unpaid taxes when the tax sought to be collected was illegally assessed: *Northwestern Lumber Co. v. Chehalis County*, 25 Wash. 95. It was held in *Southern R. Co. v. Asheville*, 69 Fed. Rep. 359, that the levy of an illegal tax against a common carrier would be restrained where the tax was made a lien on real estate, though the carrier's personal property would first be resorted to by the collector.

¹ *Osborn v. Bank of United States*, 9 Wheat. 738, where an officer was enjoined from enforcing a heavy state tax unlawfully laid on a branch of the Bank of the United States, on the ground that to enforce it would drive the bank from the state and work irreparable mischief. See *Foote v. Linck*, 5 McLean 616; *Cummings v. National Bank*, 101 U. S. 153; *Wright v. Railroad Co.*, 64 Ga. 786. In *Detroit v. Wayne Circuit Judge*, 127 Mich. 604, the collection of a personal tax against a street railway company was restrained because

the levy would interfere with the exercise of a valuable franchise. It was held in *Lenawee County Sav. Bank v. Adrian*, that where a bank, under the law, is not liable at all to taxation on its personal property, and where the levy is made in such a way as to interfere directly with its business, the enforcement of the tax would be restrained by injunction. See *Bank of Kentucky v. Stone*, 88 Fed. Rep. 383. That national banks may sue to restrain collection of an illegal tax levied against them on their stock, see *Jones v. Rushville Nat. Bank*, 138 Ind. 87; *Andrews v. King County*, 1 Wash. 46, followed by *First Nat. Bank v. Hungate*, 62 Fed. Rep. 548. As to the sufficiency of a bank's complaint seeking to enjoin the collection of taxes, see *First Nat. Bank v. Seymour*, 157 Ind. 479.

² *Ex parte Chamberlain*, 55 Fed. Rep. 704; *Dawson v. Croisan*, 18 Or. 431. A court whose receiver is in charge of a railroad may properly allow an injunction *pendente lite* forbidding the state taxing officers from collecting disputed taxes levied against a part of the railroad property: *Clark v. McGhee*, 87 Fed. Rep. 789, 31 C. A. 321, 59 U. S. App. 69.

³ See *Odlin v. Woodruff*, 31 Fla. 160; *Henry v. Gregory*, 29 Mich. 68, 70; *Detroit v. Wayne Circuit Judge*, 127 Mich. 604.

⁴ *First Nat. Bank v. Douglas*

Amplified jurisdiction in some states. It must be conceded, however, that the courts in some states go further, and sustain the interposition of equity, particularly by injunction, in all cases of illegal taxation; proceeding, in doing so, upon the ground that "when officers or individuals have no legal authority to lay a tax, and they assume the right; or when persons are vested with the legal authority to lay a tax for a specified purpose, but instead of exercising that power they proceed to impose a tax which the law has not authorized, or lay it for fraudulent or unauthorized purposes; then a court of equity will interpose to afford preventive relief, by restraining the exercise of powers perverted to fraudulent or oppressive purposes."¹ But in the large majority of cases in which taxes are

County, 3 Dill. 298. Injunction allowed where by statute replevin was prohibited and the collector was irresponsible: *Deming v. James*, 72 Ill. 78. So where the county was insolvent, and if required to repay the tax would do so in warrants worth less than par: *Northern Pac. R. Co. v. Carland*, 5 Mont. 146. So where the remedy by action to recover back the taxes would only lie when they had been paid under duress of a distraint, and where the officers could avoid such remedy by bringing an action at law instead of distraining: *Bank of Kentucky v. Stone*, 88 Fed. Rep. 383. So where the tax had been paid: *Lewis v. Spencer*, 7 W. Va. 639. So where the collector was proceeding against another party than the one assessed: *Seeley v. Westport*, 47 Conn. 294. But this only on application of the person he is proceeding against: *Waterbury Sav. Bank v. Lawler*, 46 Conn. 243; *Archer v. Railroad Co.*, 102 Ill. 493. See *Columbus, etc. R. Co. v. Grant County*, 65 Ind. 427.

¹ *Drake v. Phillips*, 40 Ill. 388, 393, per *Walker*, Ch. J. See, also, *Albany, etc. Bank v. Maher*, 19

Blatch, 175; *Gillette v. Denver*, 21 Fed. Rep. 822; *Mobile v. Baldwin*, 57 Ala. 62; *Montgomery v. Sayre*, 65 Ala. 564; *Davis v. Petrinovich*, 112 Ala. 654; *National Bank v. Long (Ariz.)*, 57 Pac. Rep. 639; *Frost v. Flick*, 1 Dak. 131; *Alexander v. Dennison*, 2 MacArth. 562; *Finnegan v. Fernandina*, 15 Fla. 379; *Swinney v. Beard*, 71 Ill. 27; *McConkey v. Smith*, 73 Ill. 313; *Lebanon v. Railway Co.*, 77 Ill. 539; *National Bank v. Cook*, 77 Ill. 622; *Toledo, etc. R. Co. v. Lafayette*, 22 Ind. 262; *Jefferson v. Patterson*, 32 Ind. 140; *Shoemaker v. Grant County*, 36 Ind. 175; *Knight v. Flatrock, etc. Co.* 45 Ind. 134; *Clay County Com'rs v. Markle*, 46 Ind. 96; *Riley v. Western Union Tel. Co.*, 47 Ind. 511; *Spencer v. Wheaton*, 14 Iowa 38; *Williams v. Peiney*, 25 Iowa 436; *Burnes v. Leavenworth*, 2 Kan. 454; *St. Clair Board's Appeal*, 74 Pa. St. 252; *McClung v. Livesay*, 7 W. Va. 329; *Douglass v. Harrisville*, 9 W. Va. 162; *Corrothers v. Board of Educ.*, 16 W. Va. 527; *Warden v. Supervisors*, 14 Wis. 618; *Foote v. Milwaukee*, 18 Wis. 270; *Ivinson v. Hance*, 1 Wyo. 270.

illegal, there is no fraud, actual or intended, and the illegality consists in an erroneous construction of powers, or in the unintentional omission of some necessary proceeding, or in other defect not inconsistent with good faith on the part of officers; and it seems a great stretch of equitable principles to treat such a case as one of legal fraud, and to be remedied on that ground. The equitable jurisdiction in these cases has grown up somewhat imperceptibly, and perhaps owes its origin as much to an idea that municipal officers, in the authority which affects the property of the people, are exercising a trust over which equity may properly assume a supervision, as to any supposed fraud, actual or constructive, which may be involved in their illegal action.¹ In the case of municipal assessments

¹ The courts of Georgia are very liberal in applying the remedy by injunction in the case of illegal taxation: See *Southwestern R. v. Wright*, 68 Ga. 311; *Albany Bottling Co. v. Watson*, 103 Ga. 503; *Price Co. v. Atlanta*, 105 Ga. 358; *Penick v. High Shoals Manuf. Co.*, 113 Ga. 592. Compare *Verdery v. Summerville*, 82 Ga. 138. And as to Florida, see *Smith v. Long*, 20 Fla. 697; *Pensacola v. Bell*, 22 Fla. 466. An ordinance allowing forty separate executions to be levied on the goods of the same person for a continuing failure to pay the tax required thereby, having been adjudged void, collection will be enjoined: *Gould v. Atlanta*, 55 Ga. 678. In Illinois equity has jurisdiction to enjoin collection of a tax assessed on property not liable to taxation, the remedy provided by the revenue act being cumulative merely: *Illinois Central R. Co. v. Hodges*, 113 Ill. 323; *Rosehill Cemetery Co. v. Kern*, 147 Ill. 483. So it has jurisdiction to enjoin the collection of a tax not authorized by law and wholly illegal and void: *Olney L. & B. Assoc. v. Parker*, 196 Ill. 388.

Where a party is assessed for property neither owned nor controlled by him, the assessment is without authority of law, and may be enjoined: *Searing v. Heavysides*, 106 Ill. 85. And in Illinois chancery will enjoin the collection of a tax based on an illegal assessment: *Allwood v. Cowen*, 111 Ill. 481. In Indiana an injunction will issue to restrain the collection of illegal taxes: *Yocum v. First Nat. Bank*, 144 Ind. 272. See *Fleener v. Claman*, 112 Ind. 288. In Iowa the collection of taxes based on an illegal increase by the county board will be restrained: *Montis v. McQuiston*, 107 Iowa 651. The Kansas civil code gives an enlarged or additional remedy to a taxpayer to restrain the collection of an illegal tax; and although this is a statutory remedy, yet the court's jurisdiction is to be exercised upon equitable principles, and the taxpayer must exhibit a case in which upon the merits he is entitled to the equitable relief demanded: *Stewart v. Hovey*, 45 Kan. 708. In Kentucky the right to have the collection of an illegal and void tax restrained by injunc-

“courts of equity have been inclined,” to use the words of an eminent writer, “to relax somewhat the stringency of the rule of non-interference as applied to the collection of state taxes.

tion has long been recognized upon the ground of the inadequacy of the remedy at law: *Gates v. Barrett*, 79 Ky. 298; *Baldwin v. Shine*, 84 Ky. 502; *Norman v. Boaz*, 85 Ky. 557; *Clark v. Leathers* (Ky.), 5 S. W. Rep. 576; *Baldwin v. Hewitt*, 88 Ky. 673; *Negley v. Henderson Bridge Co.* (Ky.), 54 S. W. Rep. 171. In Maryland equity will entertain a bill to restrain collection of taxes where the register of wills has returned property for taxation as in an administrator's hands after it has been distributed: *Nicodemus v. Hull*, 93 Md. 364. By statute in Mississippi courts of chancery have jurisdiction to restrain the collection of taxes levied or attempted to be levied without authority of law: *Portwood v. Baskett*, 64 Miss. 213; *Meridian v. George*, 67 Miss. 86. In Missouri it is said, “This court has been disposed to regard with favor proceedings which are preventive in their character, rather than compel the injured party to seek redress after the damage is accomplished.” *Overall v. Ruenzi*, 67 Mo. 203, 207. But this is perhaps to avoid multiplicity of suits. See *Ranney v. Bader*, 67 Mo. 476, 480; *Marsh v. Supervisors*, 42 Wis. 502. In that state injunction is the proper remedy where property has been levied on to enforce payment of a void tax: *St. Louis & S. F. R. Co. v. Epperson*, 97 Mo. 300. Or to prevent collection of taxes in excess of the constitutional limitation, the taxpayer having paid all taxes except those claimed by him to be illegal: *Arnold v. Hopkins*, 95 Mo. 569. And

the collection of a tax levied upon property not subject to taxation will be restrained: *Valle v. Ziegler*, 84 Mo. 214. But the statute providing that the remedy by injunction shall exist where an injury to property is threatened, and to prevent the doing of any “legal wrong,” when, in the opinion of the court, an adequate remedy cannot be afforded by an action for damages, does not authorize an injunction when the board of equalization has acted in good faith and in conformity with law, as no “legal wrong” has been done though complainant's property is overvalued: *Hazard v. O'Bannon*, 38 Fed. Rep. 220. In North Carolina a recent statute provides that injunctive relief may be had if a tax or assessment is illegal or invalid: See *Armstrong v. Stedman* (N. C.), 41 S. E. Rep. 278. For prior decisions, see *Riggsbee v. Durham*, 84 N. C. 800; *Raleigh & G. R. Co. v. Lewis*, 99 N. C. 62; *Mace v. Carteret County Com'rs*, 99 N. C. 65; *Mathews v. Sampson County Com'rs*, 99 N. C. 69; *Hall v. Fayetteville*, 115 N. C. 281. In Oklahoma suit may be maintained to restrain the illegal levy of a tax, or the collection thereof: *Atchison, T. & S. F. R. Co. v. Wiggins*, 5 Okl. 477; *Wallace v. Bullen*, 6 Okl. 17; *Cranmer v. Williamson*, 8 Okl. 683; *Durham v. Linderman* (Okl.), 64 Pac. Rep. 15. In Pennsylvania equity may interfere to restrain collection where there is either a want of power to tax or a disregard of the constitution in the mode of assessment: *Banger's Appeal*, 109 Pa. St.

Though it is difficult to perceive any sufficient reason for such distinction, yet the distinction itself remains."¹

In view of the conflict in the decisions regarding the basis of equitable jurisdiction, it seems advisable to classify somewhat the cases which have been decided, indicating, wherever necessary, the points of divergence.

91. And injunction is the proper remedy against a tax on property not subject thereto: *St. Mary's Gas Co. v. Elk County*, 191 Pa. St. 458; *Ridgway Light, etc. Co. v. Elk County*, 191 Pa. St. 465. And where an ordinance authorizing the assessment of a sewer tax on abutting property is null and void for want of a compliance with statutory prerequisites, collection of the tax will be restrained: *Harper's Appeal*, 109 Pa. St. 9. In Texas injunction is the proper remedy to prevent the collection of an illegal tax: *Davis v. Burnett*, 77 Tex. 3; *Lum v. Bowie* (Tex.), 18 S. W. Rep. 142. It is the proper remedy in Virginia to prevent the enforcement of a tax levied on exempt property: *Staunton v. Mary Baldwin Sem. (Va.)*, 39 S. E. Rep. 596. In West Virginia, it is said, an injunction will not in general be allowed, in case of an illegal tax, if the party was subject to the jurisdiction. But if property not subject to taxation is taxed, or if a tax is imposed beyond the constitutional limit, collection will be enjoined: *Christie v. Malden*, 23 W. Va. 667; *Tygert's Valley Bank v. Philippi*, 38 W. Va. 219. And injunction is the proper remedy to prevent a city from collecting taxes assessed against persons or property which it has no right to tax: *Crim v. Philippi*, 38 W. Va. 122.

¹ High on Injunctions, § 369. See *Alexandria, etc. Co. v. District of Columbia*, 1 Mack. 217. And fur-

ther as to the enjoining of assessments for local improvements, see *Terre Haute v. Mack*, 139 Ind. 99; *Chicago, M. & St. P. R. Co. v. Phillips*, 111 Iowa 377; *Buddecke v. Ziegenheim*, 122 Mo. 239; *Pickton v. Fargo* (N. D.), 88 N. W. Rep. 90; *Oregon & C. R. Co. v. Portland*, 25 Or. 229; *Kline v. Tacoma*, 11 Wash. 193; *Wilson v. Philippi*, 39 W. Va. 75; *Lieberman v. Milwaukee*, 89 Wis. 336; *Dietz v. Neenah*, 91 Wis. 422. If a public improvement is abandoned, the tax laid therefor will be enjoined: *Worthen v. Badgett*, 32 Ark. 496. If a complaint to restrain the collection of an assessment for a local improvement in a city merely alleges the assessment to be illegal and void, without specifying in what respect, it is insufficient, as the city officers are presumed to have performed every duty imposed upon them: *Phillips v. Sioux Falls*, 5 S. D. 524. To a suit by a taxpayer to enjoin, as unlawful as against him, the collection of a tax assessed for a special improvement, the contractors who are to perform the work are not necessary parties: *Chicago, M. & St. P. R. Co. v. Phillips*, 111 Iowa 377. In a suit to vacate or enjoin an assessment for street improvements, the burden is on the complainant to show invalidity, or that unauthorized expense was incurred: *McVerry v. Boyd*, 89 Cal. 304; *Beaumont v. Wilkes Barre*, 142 Pa. St. 198.

Injunctions; how restricted and conditioned. The available remedy in equity, when any is admissible, is commonly that by injunction.¹ It is probable that this remedy has been some-

¹ *Lumber Co. v. Hayward*, 20 Fed. Rep. 422; *Wells v. Dayton*, 11 Nev. 161. A tax will not be enjoined unless it appears upon the duplicate in the officer's hands: *Worley v. Harris*, 82 Ind. 493. Unless it appears that the officer has the power to levy by virtue of the proper warrant a tax will not be enjoined, but the party will be left to legal remedies if his property is seized: *Brown v. Herron*, 59 Ind. 61; *Millikin v. Bloomington*, 72 Ind. 161; *Anthony v. Sturgis*, 86 Ind. 479. A suit to enjoin the collection of a tax will not lie where the tax is not yet due, and there is no threat to collect it or anticipation that there will be an attempt to collect it: *Insurance Co. v. Bonner*, 24 Colo. 220. A suit to enjoin an assessment is prematurely brought where no action contemplating the making of such assessment has been taken: *Lutman v. Lake Shore & M. S. R. Co.*, 56 Ohio St. 433. A suit to set aside the entire assessment of property in a city will not lie before the taxes have been extended or the tax-roll made out: *Gilkey v. Merrill*, 67 Wis. 459. Injunction will not lie to restrain the placing of property on the tax-duplicate for collection as omitted property where it is not found as a fact that defendant has any such purpose, or that he would have assessed the property as omitted property if not enjoined: *Crowder v. Riggs*, 153 Ind. 158. An injunction will not lie to restrain the collection of fees ordered by the county court to be added to unpaid taxes to cover costs of collec-

tion by the sheriff, where the tax-roll is still in his hands, without authority to enforce collection, and is merely kept open by him, under the court's order, for the voluntary payment of taxes: *Oregon Real-Estate Co. v. Multnomah County*, 35 Or. 285. An injunction will not issue to restrain the collection of a tax where it appears only that a levy and collection are to be attempted at some future time: *Challis v. Atchison*, 39 Kan. 276, and *Andrews v. Love*, 46 Kan. 264, following *Wyandotte & K. C. Bridge Co. v. County Com'rs*, 10 Kan. 326. The collection of an assessment will not be enjoined where the bill fails to show that defendant is proceeding to collect the assessment: *Clark v. Worcester*, 167 Mass. 81. The spreading on the assessment rolls of a certain increase made by the board of equalization in the assessment of mortgages, will not be restrained, but relief must be sought after attempted collection of the tax, and on payment of the amount conceded to be due: *Goodnough v. Powell*, 23 Or. 525. But suit to restrain the collection of special assessments to pay the cost of creating a system of sewerage is not prematurely brought when it appears that the amount of such assessment has been ascertained, and notice thereof given to the property owners: *Andrews v. Love*, 50 Kan. 701. As a suit to restrain the collection of taxes need not be brought within any fixed time, the question of laches is to be determined from the facts in the case: *Richards v. Hatfield*, 40 Neb. 879.

times awarded with too little regard to any other consequences than those which concerned the individual applying for it. But the personal consequences are not the only ones which should be kept in view in these cases. When the illegalities complained of affect only the person complaining, an injunction which restrains proceedings as to him may cause no considerable mischief, and may very properly be awarded if a sufficient case is made out; but when they affect the whole tax levy, as they often do, a court should be extremely cautious in awarding, on the complaint of one person, or even of several, a process which may reach the cases of others not complaining, and which may seriously embarrass all the operations of the government depending on the source of revenue which by means of it would be stopped. Courts have frequently remarked upon the impossibility of the government's calculating with any certainty upon its revenues if the collection of taxes were subject to be arrested in every instance in which a taxpayer or tax-collector could make out *prima facie* a technical case for arresting such collection; and it is justly said to be much better to let the individual pay to the government the demands it makes upon him, and, if he considers them wholly or in part illegal, apply for the refunding of the money with interest afterwards.¹

So serious have been the embarrassments by an improvident employment of the writ of injunction and other obstructive process, that the legislature has in some cases deemed it necessary to interpose and forbid the issue of injunction, replevin or other specified writs, the tendency of which would be to embarrass collections, and the validity of such legislation has

¹ *Eve v. State*, 21 Ga. 50; *Cady v. Lennard*, 45 Ga. 85; *Scofield v. Parkerson*, 46 Ga. 50. "Except under very special circumstances the power of taxation (which includes the collection as well as the assessing of taxes) ought not to be interfered with by injunction:" *Stevens v. New York & O. M. R. Co.*, 13 Blatch. 104. Injunction to restrain the collecting of taxes will not issue unless in the clearest cases of want of jurisdiction in

the assessing and collecting officers: *Black v. Boyd*, 155 Pa. St. 163. An injunction to restrain the collection of taxes will not issue unless irreparable damage is threatened: *Rome, Watertown, etc. R. Co. v. Smith*, 39 Hun 332. The collection of a water-tax bill will not be enjoined except under circumstances of great necessity, and to prevent irreparable damage: *Brass v. Rathbone*, 8 App. Div. 78, 40 N. Y. Supp. 466.

been sustained.¹ The courts also have sometimes imposed conditions to equitable remedies in cases where they deemed the public interest to demand it. Thus where an injunction has been applied for to restrain the collection of a tax, partly legal and partly not, the court has made the payment of the legal a condition precedent;² and it has been strongly intimated, in a

¹ *Snyder v. Marks*, 109 U. S. 189; *Kensett v. Stevens*, 18 Blatch. 397; *Paul v. Railroad Co.*, 4 Dill. 35; *Moore v. Holloway*, 4 Dill. 52; *Alkan v. Bean*, 8 Biss. 83; *San Jose Gas Co. v. January*, 57 Cal. 614; *Swinney v. Beard*, 71 Ill. 27; *Wilson v. Weber*, 3 Ill. App. 125; *Faris v. Reynolds*, 70 Ind. 359; *Mullikin v. Reeves*, 71 Ind. 281; *Mesker v. Koch*, 76 Ind. 68; *Rinard v. Nordyke*, 76 Ind. 130; *Quill v. Indianapolis*, 124 Ind. 292; *Grimmell v. Des Moines*, 57 Iowa 144; *Eddy v. Lee T'p*, 73 Mich. 123; *Lake Superior S. C. R. & S. Co. v. Auditor-General*, 79 Mich. 351; *Astor v. New York*, 39 Super. Ct. 120; *Raleigh & S. R. Co. v. Lewis*, 99 N. C. 62; *National Bank v. Boyd*, 35 S. C. 233. In Georgia the courts are forbidden to interfere with the collection of state taxes; but the prohibition will not be applied to a case where a pretended tax is wholly illegal: *Decker v. McGowan*, 59 Ga. 805; *Smith v. Goldsmith*, 63 Ga. 736; *Wright v. Railroad Co.*, 64 Ga. 783. In Nebraska the statute allows the collection of taxes to be enjoined only when such taxes are levied for an illegal or unauthorized purpose: *Philadelphia Mortg. & T. Co. v. Omaha (Neb.)*, 90 N. W. Rep. 917, citing earlier cases. But the legislature cannot, it is held in Nebraska, debar a taxpayer from enjoining the unlawful sale of his property to pay a void tax or assessment which creates a cloud on

the title: *Touzalin v. Omaha*, 25 Neb. 817; *Bellevue Imp. Co. v. Bellevue*, 39 Neb. 876; *Morris v. Merrell*, 44 Neb. 423; *Chicago, B. & Q. R. Co. v. Nemaha County*, 50 Neb. 393; *Ives v. Irey*, 51 Neb. 136; *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369; *Chicago, B. & Q. R. Co. v. Nebraska City*, 53 Neb. 453; *Grand Island & W. C. R. Co. v. Dawes County (Neb.)*, 86 N. W. Rep. 934. And an injunction will issue to restrain the illegal levy of taxes on property not within the district where the tax should be levied: *Thatcher v. Adams County*, 19 Neb. 485. In *Parrotte v. Omaha*, 61 Neb. 96, it is said that a party seeking to enjoin the collection of a special tax must show that the taxing power has not been lawfully exercised, or that there have been fatal infirmities in procedure. See *Burlington & W. R. Co. v. Kearney County*, 17 Neb. 511; *Webster v. Lincoln*, 50 Neb. 1. The New York liquor-tax law of 1896 held to be a revenue law to the extent that the enforcement of it will not be restrained by injunction: *Balogh v. Lyman*, 6 App. Div. 271, 39 N. Y. Supp. 780. It is held in South Carolina that the terms of a statute prohibiting courts from enjoining the collection of taxes include assessments on townships to pay railroad-aid subscriptions: *Chamblee v. Tribble*, 23 S. C. 70.

² *State Railroad Tax Cases*, 92 U. S. 575; *National Bank v. Kim-*

case where it was alleged the assessment had, by fraud, been made too high, that the payment of what the party conceded would be his just proportion ought to be required before in-

ball, 103 U. S. 732; Albuquerque Bank v. Perea, 147 U. S. 87; Northern Pac. R. Co. v. Clark, 153 U. S. 252; Parmelee v. Railroad Co., 3 Dill. 25; Huntington v. Palmer, 7 Sawy. 355, 8 Fed. Rep. 449; Northern Pac. R. Co. v. Walker, 47 Fed. Rep. 681; Richmond & D. R. Co. v. Blake, 49 Fed. Rep. 904; Chicago, B. & Q. R. Co. v. Board of Com'rs, 67 Fed. Rep. 411, 413, 14 C. C. A. 458; Alexander v. Dennison, 2 MacArth. 562; Tallahassee Manuf. Co. v. Spigener, 49 Ala. 262; Alabama, etc. Ins. Co. v. Lott, 54 Ala. 499; Montgomery v. Sayre, 65 Ala. 564; In re Delinquent Tax-List (Ariz.), 37 Pac. Rep. 370; Twombly v. Kimbrough, 24 Ark. 459; Worthen v. Badgett, 32 Ark. 496; Easterbrook v. O'Brien, 98 Cal. 671; Quint v. Hoffman, 103 Cal. 506; Mackay v. San Francisco, 113 Cal. 392; Insurance Co. v. Bonner, 24 Colo. 220; American Refrig. Transit Co. v. Thomas, 28 Colo. 119; Adams v. Castle, 30 Conn. 404; Cheney v. Jones, 14 Fla. 587; Tampa v. Mugge, 40 Fla. 326; Pickett v. Russell, 42 Fla. — (28 South. Rep. 764); Augusta Factory v. Augusta City Council, 83 Ga. 734; O'Kane v. Treat, 25 Ill. 557; Taylor v. Thompson, 42 Ill. 9; Briscoe v. Allison, 43 Ill. 291; Reed v. Taylor, 56 Ill. 288; Barnett v. Cline, 60 Ill. 205; Johnson v. Roberts, 102 Ill. 655; Moore v. Wyman, 107 Ill. 192; Meadowcroft v. Kochersperger, 170 Ill. 356; Harrison v. Haas, 25 Ind. 281; Roseberry v. Huff, 27 Ind. 12; Board of Com'rs v. Elston, 32 Ind. 27; South Bend v. University, 69 Ind. 341; Cauldwell v. Curry, 93

Ind. 363; Board of Com'rs v. Dailley, 115 Ind. 360; Loesnitz v. Seelinger, 127 Ind. 422; Hewett v. Fenstamaker, 128 Ind. 315; Hyland v. Central I. & S. Co., 129 Ind. 68; Smith v. Rude Bros. Manuf. Co., 131 Ind. 150; Shepardson v. Gillette, 131 Ind. 125; Buck v. Miller, 147 Ind. 586; Morrison v. Hershire, 32 Iowa 271; Corbin v. Woodbine, 33 Iowa 297; Casady v. Lowry, 49 Iowa 523; Shelton v. Dunn, 6 Kan. 128; Ottawa v. Barnes, 10 Kan. 270; Lawrence v. Killam, 11 Kan. 499; Challiss v. Hekelnskaemper, 14 Kan. 474; Hagaman v. Cloud County, 19 Kan. 394; Knox v. Dunn, 22 Kan. 683; Gandy v. Commissioners, 23 Kan. 738; Pritchard v. Madren, 24 Kan. 486; Wilson v. Longendyke, 32 Kan. 267; Bank of Garnett v. Ferris, 55 Kan. 120; Alleghany County Com'rs v. Union Mining Co., 61 Md. 545; Conway v. Waverley, 15 Mich. 257; Palmer v. Napoleon, 16 Mich. 176; Tisdale v. Auditor-General, 85 Mich. 261; Mobile & O. R. Co. v. Moseley, 52 Miss. 127; Overall v. Ruenzi, 67 Mo. 203; Frazer v. Siebern, 16 Ohio St. 614; State Nat. Bank v. Carson (Okl.), 50 Pac. Rep. 990; Collins v. Green (Okl.), 62 Pac. Rep. 817; Brown v. School Dist., 12 Or. 345; Welch v. Clatsop County, 24 Or. 452; Welch v. Astoria, 26 Or. 89; Dayton v. Multnomah County, 34 Or. 239; Alliance Trust Co. v. Multnomah County, 38 Or. 433; Rosenberg v. Weekes, 67 Tex. 578; HERSHEY v. Milwaukee County, 16 Wis. 185; Bond v. Kenosha, 17 Wis. 284; Myrick v. La Crosse, 17 Wis. 442; Mills v. Johnson, 17 Wis. 598;

junction should issue, in order that the proceeding may be as little as possible injurious to the public interest.¹ The general rule requiring payment or tender of the amount actually due as a condition to relief against the legal part of the tax,² has, however, no application to a case where the entire tax fails by

Mills v. Charleton, 29 Wis. 400; *Wells v. Western Paving, etc. Co.*, 96 Wis. 716. Where an ordinance levied a tax to pay for a street improvement on the credit basis, when the necessary request of property owners to have the improvement paid for on that plan had not been made, the levy was not void, but merely excessive, and one could only enjoin the collection of the illegal excess by paying the part which was legal: *Thompson v. Lexington*, 104 Ky. 165.

¹ *Merrill v. Humphrey*, 24 Mich. 170. See *Frazer v. Siebern*, 16 Ohio St. 614.

² As to the necessity of a tender in the bill, see *State Railroad Tax Cases*, 92 U. S. 575; *Northern Pac. R. Co. v. Walker*, 47 Fed. Rep. 681; *Hare v. Carnall*, 39 Ark. 196; *Wells, Fargo & Co.'s Express v. Crawford County*, 63 Ark. 576; *Wright v. Railroad Co.*, 64 Ga. 783; *Maple v. Vestal*, 114 Ind. 325; *Logansport v. McConnell*, 121 Ind. 416; *Hewett v. Fenstermaker*, 128 Ind. 315; *Smith v. Union County Nat. Bank*, 131 Ind. 150; *Bundy v. Summerland*, 142 Ind. 92; *Buck v. Miller*, 147 Ind. 586; *Studabaker v. Studabaker*, 152 Ind. 89; *Allegany County Com'rs v. Union Mining Co.*, 61 Md. 545; *Connors v. Detroit*, 41 Mich. 128; *Welch v. Astoria*, 26 Or. 89; *Blue Jacket Consol. Copper Co. v. Scherr*, 51 W. Va. — (40 S. E. Rep. 514). It was held in *Covington v. Rockingham*, 93 N. C. 134, that the collection of a tax

will not be enjoined where that part which is legal is not pointed out, and an offer to pay it made. In *Clement v. Everest*, 29 Mich. 29, it was held that if the bill shows precisely the amount of the excess of the taxes which are claimed to be illegal, and only asks to have the collection of the illegal taxes restrained, the bill will not be dismissed for want of a formal offer to pay the legal taxes. Compare *Board of Com'rs v. Elston*, 32 Ind. 27. A complaint to have set aside an order increasing by a specific amount the assessed value of property, and to enjoin collection of taxes assessed thereon, need not allege payment or tender of any taxes: *Yocum v. First Nat. Bank*, 144 Ind. 272. Where a bill to enjoin the collection of taxes avers a tender to the collector of all taxes legally assessed, and seeks only to enjoin an illegally levied excess, such bill is not objectionable on the ground that the taxes admitted to be due were not paid or tendered, though it does not repeat the offer: *Meridian v. George*, 67 Miss. 86. The county treasurer's positive refusal to receive the valid part of taxes sought to be enjoined waives a farther tender: *Gray v. Stiles*, 6 Okl. 455. As to consequences of failing to tender as much as the court subsequently finds to be due, see *Chicago, B. & Q. R. Co. v. Board of Com'rs*, 67 Fed. Rep. 411, 413, 14 C. C. A. 458; *Landes Estate Co. v. Clallam County*, 19 Wash. 569.

reason of an illegal assessment;¹ and if the tax or assessment is wholly void complainant need not pay or tender anything.²

Complainant must have interest. It is a general principle that one will not be heard to complain of action which is not injurious to him.³ Thus, white taxpayers will be denied relief against a school-tax levied under a statute which they assert is unconstitutional because under it the property of negroes is taxed although they are not allowed to vote upon the question of taxation or to participate in the benefits for which the tax is levied.⁴ When public securities are issued, the coupons to which are by law receivable for taxes, if the state by subsequent enactment undertakes to defeat this right and the tax-collectors refuse to receive the coupons in payment of taxes, a holder of coupons who is not shown to be a taxpayer cannot have an injunction to restrain a tax-collector from such refusal.⁵

¹ *Norwood v. Baker*, 172 U. S. 269; *Jones v. Holzapfel* (Okla.), 68 Pac. Rep. 511.

² *Albany, etc. Bank v. Maher*, 9 Fed. Rep. 884; *Chase v. City Treasurer*, 122 Cal. 540; *Morris v. Merrell*, 44 Neb. 423; *Sioux City Bridge Co. v. Dakota County*, 61 Neb. 75; *Ladd v. Spencer*, 23 Or. 193; *Lewiston, etc. Co. v. Asotin County*, 24 Wash. 371. See *Ball v. Meridian*, 67 Miss. 91. Failure to pay or offer to pay the proportion justly chargeable does not preclude relief where the assessment was made upon a basis so false and unwarranted as to furnish no data upon which such proportion could be ascertained: *Howell v. Tacoma*, 3 Wash. 711; *Griggs v. Tacoma*, 3 Wash. 785. If, however, the tax is void only for want of a formality, the complainant should pay, or offer to pay, the taxes justly due: *Wood v. Helmen*, 10 Neb. 65. See *Hunt v. Easterday*, 10 Neb. 165; *Union Pac. R. Co. v. Ryan*, 2 Wyo. 391. As to the validity of provisions requiring tender or payment of

taxes as a condition precedent to suit, see *ante*, pp. 904, 905. A provision in a city charter that no action should be brought to test the validity of any assessment unless plaintiff should first tender and pay into court the assessed tax, was held invalid on the ground that the constitutional provision authorizing cities to enact their own charters did not contemplate such a sweeping deprivation of ordinary legal rights: *Wilson v. Seattle*, 2 Wash. St. 543.

³ A taxpayer's petition to have the disbursement of a tax restrained on the ground that the proceedings by which it was levied and collected are invalid, must aver the amount of the tax paid by the petitioner, as one is not entitled to an injunction unless he shows substantial damage: *Robins v. Latham*, 134 Mo. 466.

⁴ *Norman v. Boaz*, 85 Ky. 557; *Eakins v. Eakins* (Ky.), 20 S. W. Rep. 285.

⁵ *Marye v. Parsons*, 114 U. S. 325.

One cannot maintain a bill to restrain the collection of a tax from another,¹ or to enjoin the spreading on the tax-roll of an illegal increase in the valuation of property which he does not own and in which he has no interest.² And a city cannot enjoin the collection within its limits of a tax to pay bonds alleged to be illegal. "The city has no property subject to taxation, and whether the taxes levied upon citizens shall be collected or not is a matter of their own concern."³ But one who has purchased property assessed for public improvements, covenanting, as part of the consideration, to pay the assessments which had not then been made, is presumptively injured by an illegal assessment, his covenant imposing on him no liability beyond the payment of legal assessments, and he can sue to vacate such assessment.⁴ And where a tax is null and void, a subsequent purchaser of the property subject thereto may enjoin the collection of it.⁵

A corporation may sue to restrain a tax on the shares belonging to its stockholders;⁶ and that without joining the stockholders.⁷

Multiplicity of suits; joint complaint by several persons taxed.
There are cases in which equity on a single record might dis-

¹ Missouri River, etc. R. Co. v. Wheaton, 7 Kan. 232. The Wisconsin statutes regulating the relief to which one erroneously assessed is entitled are not to be construed as authorizing an action to defeat the entire assessment. "No action can be maintained by one person to set aside taxes generally as to all parties in the town, county, or municipalities:" Gilkey v. Merrill, 67 Wis. 459.

² Caffrey v. Overholser, 8 Okl. 202. Payment of taxes on land by one who has no title gives him no right to enjoin the sale of the land for taxes: Broderick v. Allamakee County, 104 Iowa 750.

³ Waverley v. Auditor, 100 Ill. 354.

⁴ In re Pennie, 108 N. Y. 364. See Batty v. Hastings (Neb.), '88 N. W. Rep. 139.

⁵ Vesta Mills v. Charleston (S. C.), 38 S. E. Rep. 226.

⁶ Knopf v. First National Bank, 173 Ill. 331. See Pelton v. National Bank, 101 U. S. 143; Cummings v. National Bank, 101 U. S. 153. *Contra*, Waseca County Bank v. McKenna, 32 Minn. 468.

⁷ Planters' Crescent Oil Co. v. Assessor, 41 La. An. 1137; Citizens' Nat. Bank v. Columbia County, 23 Wash. 441. But to a bill filed by a stockholder to restrain illegal taxation of the corporation, the corporation must be made a party: Davenport v. Dows, 18 Wall. 626.

pose of controversies which at law would require a multiplicity of suits; and this fact may furnish ample ground for equity jurisdiction, for both the public and the parties are interested in avoiding unnecessary litigation.¹ Thus, in order to avoid a multiplicity of suits equity will interfere to protect a national bank which seeks to enjoin the collection of a tax wrongfully assessed against the shares of its stockholders;² for the same reason the assessment of an illegal tax against a telegraph company in several counties will be restrained;³ and a bank may have an injunction against the enforcement of city taxes levied upon its capital, where the city has in previous years repeatedly levied similar taxes, thus causing litigation wherein the validity of the bank's exemption from taxation was sustained.⁴ But it has been held that where the statute authorizes an action to recover back illegal taxes paid, the collection of such taxes will not be restrained in equity to prevent multiplicity of suits;⁵ and since a sale of land under a void assessment cannot result in such multiplicity, an injunction to restrain the sale will not be granted on that ground.⁶

When the supposed illegality in a tax proceeding affects a single person only, or affects him in a peculiar manner, distinguishing his case from that of others, he cannot unite in a suit to restrain such proceeding. A joint bill by ten or more parties, setting out distinct grounds on which each sought relief, would be dismissed as multifarious.⁷ But where the ille-

¹ See *California & O. L. Co. v. Gowen*, 48 Fed. Rep. 771; *Little Rock v. Prather*, 46 Ark. 471; *Philadelphia & B. R. Co. v. Neary*, 5 Del. Ch. 600; *Macomb v. Lake County*, 9 S. D. 446; *Kerr v. Woolley*, 3 Utah 456.

² *Cummings v. National Bank*, 101 U. S. 153. See *Kimball v. National Bank*, 1 Ill. App. 209. And compare *Albany, etc. Bank v. Maher*, 9 Fed. Rep. 884. Jurisdiction cannot be conferred upon a federal circuit court by joining in one bill against sheriffs of different counties claims no one of which reaches the jurisdictional

amount: *Citizens' Bank v. Cannon*, 164 U. S. 319.

³ *Western Union Tel. Co. v. Poe*, 61 Fed. Rep. 149.

⁴ *Union & P. Bank v. Memphis*, 111 Fed. Rep. 561.

⁵ *Bellevue Imp. Co. v. Bellevue*, 39 Neb. 876.

⁶ *Byrne v. Drain*, 127 Cal. 663.

⁷ *Hudson v. Atchison County*, 12 Kan. 140; *Kerr v. Lansing*, 17 Mich. 34. Compare *Cutting v. Gilbert*, 5 Blatch. 259; *Wood v. Bangs*, 1 Dak. 179; *Goodwin v. Savannah*, 53 Ga. 410. A joint bill will not lie where the only joint interest is in a question of law;

gality extends to the whole assessment, or where it affects, in the same manner, a number of persons, so that the question involved can be presented without confusion by one bill filed by all or any number of those thus affected, there seems to be no sufficient reason why a joint bill should not be permitted. The reasons favoring it are, that it avoids the necessity of a multiplicity of suits, and the attendant trouble and expense; and the objection that the interests of complainants are several is sufficiently met by the fact that complete justice may be done to all in one suit on the single issue; whereas, if the parties did not join, the same issue must be passed upon in separate suits brought by the several complainants. Although there has been some hesitation in sanctioning such bills, the weight of authority is decidedly in favor of supporting them, and this method of redress is now most commonly resorted to where the case is appropriate for it.¹

as where a number of kinds of business are taxed, and persons employed in them seek to contest the taxation: *McGrath v. Newton*, 29 Kan. 364. This principle is said to be applicable where it is sought to assess separately several persons in the same business: *Youngblood v. Sexton*, 32 Mich. 406. A joint bill cannot be filed to set aside sales made of the complainant's lands separately for a sewer assessment: *Brunner v. Bay City*, 46 Mich. 236. The federal supreme court cannot acquire jurisdiction where injunction is sought by several taxpayers who are taxed severally, no one of them to the amount of \$5,000: *Russell v. Stansell*, 105 U. S. 303.

¹ *Mandeville v. Riggs*, 2 Pet. 482; *King v. Wilson*, 1 Dill. 555; *Coulson v. Portland*, Deady 481; *Floyd v. Gilbreath*, 27 Ark. 675; *Webster v. Harwinton*, 32 Conn. 131; *Terret v. Sharon*, 34 Conn. 105; *Barrett's Appeal*, 73 Conn. 288; *Vanover v. Justices*, 27 Ga. 354; *Harwood v. St. Clair*, etc.

Co., 51 Ill. 130; *Kimball v. Merchants' S., L. & T. Co.*, 89 Ill. 611; *Searing v. Heavysides*, 106 Ill. 85; *Allwood v. Cowen*, 111 Ill. 481; *Knopf v. First Nat. Bank*, 173 Ill. 331; *Chicago v. Collins*, 175 Ill. 445; *La Fayette v. Cox*, 5 Ind. 38; *Hill v. Jenkinson*, 15 Ind. 425; *Oliver v. Keightley*, 24 Ind. 514; *McMillan v. Lee County*, 3 Iowa 311; *State v. State-Tax Collector*, 39 La. An. 530; *Carlton v. Newman*, 77 Me. 408; *Baltimore v. Porter*, 18 Md. 284; *Baltimore v. Gill*, 31 Md. 375; *Holmes v. Baker*, 16 Gray 259; *Kerr v. Lansing*, 17 Mich. 34; *Scofield v. Lansing*, 17 Mich. 437; *Motz v. Detroit*, 18 Mich. 495; *Clee v. Sanders*, 74 Mich. 692; *Thomas v. Auditor-General*, 120 Mich. 535; *In re Minneapolis Police Dep't Relief Assoc. (Minn.)*, 88 N. W. Rep. 505; *Hooper v. Ely*, 46 Mo. 505; *Steiner v. Franklin County*, 48 Mo. 167; *Barr v. Denniston*, 19 N. H. 170; *Manly v. Raleigh*, 4 Jones' Eq. 370; *Galloway v. Jenkins*, 63 N. C. 147; *Upington v. Oviatt*, 24 Ohio

But the mere saving of the expense of several suits at law, where each of the complainants has an adequate remedy, is no ground for sustaining a joint suit in equity where no other ground of equitable relief is apparent. This is well explained by the supreme court of Connecticut, in a case in which a joint petition was filed to restrain the collection from several complainants of sewer assessments made upon their lands severally, and which were claimed to be illegal. "The multiplicity of suits, which the petition seeks to avoid, does not injuriously affect any one of the petitioners. No one of them has occasion to expect any such multiplicity affecting himself. One suit is all that any one of them has to fear, and the object of this bill would seem to be to relieve these parties severally from that one suit, and to consolidate the apprehended litigation. In other words, to enforce a consolidation rule by means of the extraordinary powers of the court of chancery. If the assessment were against one person only, it is not claimed that

St. 232; *Paulson v. Portland*, 16 Or. 450; *Mott v. Pennsylvania R. Co.*, 30 Pa. St. 39; *Page v. Allen*, 58 Pa. St. 538; *Sherman v. Carr*, 8 R. I. 431; *McTwiggan v. Hunter*, 18 R. I. 776; *Morris v. Cummings*, 91 Tex. 618; *Stevens v. Rutland*, etc. R. Co., 29 Vt. 545; *Bull v. Read*, 13 Grat. 78; *Johnson v. Drummond*, 20 Grat. 419; *Williams v. Grant County Court*, 26 W. Va. 488; *Winifrede Coal Co. v. Board of Education*, 47 W. Va. 132. For a case under the Kansas statute, see *Wyandotte, etc. Bridge Co. v. Wyandotte County*, 10 Kan. 326. See, also, *Albany, etc. Bank v. Maher*, 19 Blatch. 175; *City Nat. Bank v. Paducah*, 2 Flip. 61; *Louisville, etc. Co. v. Gaines*, 3 Fed. Rep. 266; *Greedup v. Franklin County*, 30 Ark. 101; *Vaughan v. Bowle*, 30 Ark. 278; *Schumacker v. Toberman*, 56 Cal. 508; *Tampa v. Mugge*, 40 Fla. 326; *Blandirff v. Harrison County*, 50 Iowa 164; *Bristol v. Johnson*, 34 Mich. 123; *Newsmeier v. Rail-*

road Co., 52 Mo. 81; *Corrothers v. Board of Education*, 16 W. Va. 527; *Chesapeake, etc. R. Co. v. Miller*, 19 W. Va. 408. The bill should be brought by one or more persons in behalf of all who are similarly interested; where an unconstitutional tax affects all owners in the county, a bill by certain owners in a particular district for themselves and all other owners in that district must be dismissed: *Williams v. Grant County Court*, 26 W. Va. 488. Those who unite as complainants should state in the bill that they file it in behalf of themselves and all others similarly situated: *McClung v. Livesay*, 7 W. Va. 329; *Doonan v. Board of Education*, 9 W. Va. 246. Taxpayers may unite in a bill to enjoin payment of the whole tax where the interest is common, even though there may be no specific equities in favor of individual complainants: *Sherman v. Benford*, 10 R. I. 559.

he could transfer from a court of law to a court of equity the question of his liability. But how is the condition of any one of these petitioners the worse because others are assessed for the same improvement? It would undoubtedly be convenient to try the questions relating to these warrants in one comprehensive law suit. But it does not seem to the court that the case presented by the bill is one of such irreparable injury, or of inadequate relief at law, as to warrant us in taking it away from the legal tribunals."¹

Illegal municipal action. When a municipality or its officers take or threaten to take action in the creation of a debt or in the incurring of obligations which if allowed to go on must eventually result in taxation, the only effectual remedy may be in enjoining such action *in limine*. As the action, if illegal, would constitute usurpation of authority, the state through its law officer has undoubted right to interfere by bill.² But this

¹ *Seymour, J.*, in *Dodd v. Hartford*, 25 Conn. 232, 238. And see *Sheldon v. School Dist.*, 25 Conn. 224. Compare *Savings & L. Assoc.*, 46 Cal. 416; *Houghton v. Austin*, 47 Cal. 646; *Central Pac. R. Co. v. Corcoran*, 48 Cal. 65; *Harkness v. Board of Pub. Works*, 1 MacArth. 121. Where, under a valid ordinance allowing assessments to be levied on property benefited, assessments are levied on property so situated that it cannot possibly be benefited, different owners of distinct parcels so assessed cannot join in a suit to restrain the enforcement of the assessment: *Paulson v. Portland*, 16 Or. 450. Where the board of equalization raises above the actual values the assessed valuations of properties of different persons, several causes of action arise, and not a joint one: *Weber v. Dillon*, 7 Okl. 568. Under a statute providing that when the question is one of common interest in many persons, or when the parties are

summoned and it is impracticable to bring all into court, one or more sue for the benefit of all, one owner cannot have the collection of an illegal tax enjoined as against the property of an owner similarly situated: *Stiles v. Guthrie*, 3 Okl. 26.

² See *Attorney-General v. Detroit*, 26 Mich. 263, and cases cited; *State v. Saline County Court*, 51 Mo. 350; *State v. Sanderson*, 54 Mo. 203; *Mathis v. Cameron*, 62 Mo. 504. It has been held that the state cannot interpose to enjoin the collection of school-district tax when a private action affords taxpayers ample protection: *State v. McLaughlin*, 15 Kan. 228. A township in its corporate capacity cannot enjoin a tax laid upon the taxpayers of the township: *Center T'p v. Hunt*, 16 Kan. 430. If one school district unlawfully levies and collects taxes on land in another, the latter, even though it does not levy and collect taxes on such

is not always a satisfactory remedy, because the public authorities might be indisposed to resort to it or to pursue it with sufficient vigor to render it effectual. The more common remedy, therefore, is for taxpayers to file bills on their own behalf. The right to do this has been seriously contested in some cases, it being insisted that, until a tax is actually laid, the grievance, if any, is purely a public grievance, and public grievances must be redressed on the application of the proper public authorities: it is urged that individuals can proceed in equity only when their interests are separate and individual; and such interests are only affected by the unlawful action when a tax is laid and has become an individual charge against the several persons taxed.¹ On the other hand, it is said that the case is to be distinguished from the cases of purely public wrongs, in which the general public are alike concerned; that the taxpayers constitute a class specially damaged by the unlawful act, in the increase of the burden of taxation upon their property. They have, therefore, a special interest in the subject-matter of the suit distinct from that of the general public, and the jurisdiction of equity may be sustained on the ground that the injury which would be done by the unlawful municipal action would be irreparable. This would meet any objection on the ground that the parties would have a remedy at law when the tax came to be levied.² There is great force in this

land, is not entitled to an injunction against the former, or to have refunded to it the taxes which the former has collected: *Arthur v. School Dist.*, 164 Pa. St. 410.

¹ *Morgan v. Graham*, 1 Woods 124; *Miller v. Grandy*, 13 Mich. 540; *Conklin v. Commissioners*, 13 Minn. 454; *Doolittle v. Broome Supervisors*, 18 N. Y. 155; *Roosevelt v. Draper*, 23 N. Y. 318. Where certain taxpayers had voluntarily paid a tax illegally assessed by a city, it was held that there was no such public interest as to justify a proceeding in the name of the state to enjoin the county

treasurer from paying out the money: *Atchison v. State*, 34 Kan. 379. It was said in *Prince v. Crocker*, 166 Mass. 347, that a suit by taxpayers to restrain the illegal appropriation of money by a city does not fall within the general jurisdiction of equity, but can be maintained only by virtue of some statute. In Massachusetts a remedy is given by statute: *Cooley v. Granville*, 10 Cush. 56; and many subsequent cases have been brought under statutes conferring jurisdiction.

² *Bartol*, Ch. J., in *Baltimore v. Gill*, 31 Md. 375, 394. In the case of *Crampton v. Zabriske*, 101

view. In many cases the injury that would result from the enforcement of an illegal tax would be irreparable, because the tax moneys when collected are under control of the public authorities, and if made use of by them, though under circumstances amounting to misappropriation, are effectually lost to the taxpayers, since if they sue to recover what they have paid, they will inevitably be taxed again to make up the deficiency which the repayment to them must cause. It is well settled that a misappropriation of public moneys, whereby a deficiency in its revenues is caused, will not render a subsequent tax illegal, even though it is levied for the very purpose of supplying the deficiency thus illegally caused;¹ and the importance of an interference *in limine* is therefore manifest.

U. S. 601, 609, it is said that "of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay, there is at this day no serious question. . . . Certainly in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their powers in such cases." See *Littler v. Jayne*, 124 Ill. 123; *Adams v. Brennan*, 177 Ill. 194; *Holden v. Alton*, 179 Ill. 318; *Gage v. Chicago*, 179 Ill. 392. "In so far as the action of a municipal body may be illegal and may result to the prejudice of the taxpayers, any one or more of the latter may have the right to implead the city government; but a suit thus instituted must be a

bona fide proceeding on their part, to protect their individual rights, and not in behalf of others who keep in the background:" *Johnson v. New Orleans*, 105 La. 149.

¹ See *Withington v. Howard*, 8 Cush. 66; *Wright v. Dunham*, 13 Mich. 414; *Clee v. Trenton*, 108 Mich. 293; *Moore v. School Directors*, 59 Pa. St. 232. That in New York taxpayers as such cannot maintain a bill to restrain the paying out of moneys on unfounded claims, see *Kilbourne v. St. John*, 59 N. Y. 21, citing *Susquehanna Bank v. Broome Supervisors*, 25 N. Y. 312. Compare *Hills v. Savings Bank*, 26 Hun 161; *Osterhout v. Hyland*, 27 Hun 167. In New York by statute a taxpayer may bring suit to vacate the audit of fraudulent and collusive claims. It seems in that state claims once rejected cannot be allowed by a subsequent board: *Osterhoudt v. Rigney*, 98 N. Y. 222; *Osterhoudt v. Supervisors*, 98 N. Y. 239. A taxpayer cannot be relieved from the payment of taxes on the ground that they are being improperly expended by the authorities: *Anderson v. Mayfield*,

Some states have endeavored to prevent misappropriations by providing in their constitutions that a tax shall be applied only to the object designated by the law in pursuance of which it is laid;¹ but while such a provision is obligatory upon the officers, it is one easy of evasion by men upon whom the sense of public duty rests but lightly. The occasions for interference to prevent misappropriation are therefore not uncommon; and the courts have interfered, on the application of taxpayers, not only where a tax legally laid and collected was about to be misapplied,² but also where the tax was collected

93 Ky. 230. It was held in *Cartersville Waterworks Co. v. Cartersville*, 89 Ga. 689, that a creditor of a municipal corporation cannot have an injunction against the collection of his municipal taxes on the ground that the municipality is indebted to him and has in its treasury a fund which could not legally be applied otherwise than by paying this debt, and which it refuses to pay until after the creditor discharges the claim against himself for taxes.

¹ Under such a provision funds raised for general township purposes cannot be diverted to the payment of railroad aid bonds: *National Bank v. Barber*, 24 Kan. 534. See, for a like principle, *Doty v. Ellsbree*, 11 Kan. 209. And for peculiar cases, see *State v. Leavenworth*, 2 Kan. 61; *Graham v. Horton*, 6 Kan. 343; *Atchison, etc. R. Co. v. Woodcock*, 18 Kan. 20. That in Illinois moneys raised for the county cannot be diverted to the purposes of a part of the towns, see *Sleight v. People*, 74 Ill. 47. For an interesting case raising the constitutional question, see *Fairfield v. People*, 94 Ill. 244. And see, as to Georgia, *Truett v. Justices*, 20 Ga. 102. In South Carolina it is held that, where the money has been raised,

if the object is no longer attainable, or there is no law sanctioning the appropriation to it, the money may be devoted to objects under the same general head, if no legislative contract be violated thereby: *State v. Leaphart*, 11 S. C. 458. Compare *Morton v. Comptroller*, 4 S. C. 430. See, for another case, *State v. Cobb*, 8 S. C. 123. Compare *Long v. Richmond*, 76 N. C. 273. The constitutional provision is imperative: *Dean v. Lufkin*, 54 Tex. 266. The moneys raised cannot be diverted to other objects: *State v. Haben*, 22 Wis. 660. And see, as to this last point, *Board of Liquidation v. McComb*, 92 U. S. 531. Where poll taxes are required by the constitution to be devoted to educational purposes, they may be used to pay previous school debts: *State v. Cobb*, 8 S. C. 123. A provision in a state constitution devoting certain privilege taxes to a particular purpose will modify to that extent previous municipal charters devoting the tax to other purposes: *State Board of Education v. Aberdeen*, 56 Miss. 518.

² That misappropriation may be restrained, see *Chicago v. Nichols*, 177 Ill. 97; *Rock Island v. Huesing*, 25 Ill. App. 600; *State v. Macon County Court*, 68 Mo. 29;

for an illegal purpose, so that, if the moneys were applied to that purpose, the application would in a legal sense be misappropriation.¹

The reasons for preventive remedies are very forcible when it is proposed to create a corporate debt and issue as evidence of it negotiable securities under authority of law to contract in that form, and to put such securities into circulation. The effective remedy must usually in such cases be preliminary to the threatened illegal action; and the very decided preponderance of authority is that the proper redress may be had upon the application of individual taxpayers.²

Union Pac. R. Co. v. Dawson County, 12 Neb. 254; *Shepard v. Easterling* (Neb.), 86 N. W. Rep. 941; *Blood v. Manchester Electric Light, etc. Co.*, 68 N. H. 340; *Roberts v. Fargo* (N. D.), 86 N. W. Rep. 726. That a city may be enjoined from misappropriating money collected to pay a public debt, see *Maenhaut v. New Orleans*, 2 Woods 108; *Ranger v. New Orleans*, 2 Woods 128; *Chisholm v. Montgomery*, 2 Woods 584. A taxpayer may maintain a suit to enjoin the illegal repayment of taxes by the supervisors: *Hospers v. Wyatt*, 63 Iowa 264. An intention on the part of the village council to refund the tax of an individual is not ground for restraining the collection of any tax—the remedy is by bill to prevent refunding: *Clee v. Trenton*, 108 Mich. 293. Taxes will not be enjoined on a speculative allegation that the authorities will misapply them when collected; a court of equity can at the proper time prevent such mischief on application to enjoin the misappropriation: *Bardrick v. Dillon*, 7 Okl. 535. One who owns property which has been entered for taxation, and on which he is liable to pay taxes as soon as they are collectible, is a taxpayer so

as to be entitled to bring a suit to enjoin the misappropriation of public moneys: *Alexander v. Johnson*, 144 Ind. 82.

¹ See *Rutz v. Calhoun*, 100 Ill. 391, and compare *Strohm v. Iowa City*, 47 Iowa 42. A railroad-aid tax voted but not earned will be enjoined: *Curry v. Decatur County*, 61 Iowa 71. Taxation to pay city bonds cannot be enjoined unless the city can make defense to the bonds: *Wilkinson v. Peru*, 61 Ind. 1. The holding of an election to vote upon a tax which, it is claimed, will be illegal if laid, will not be enjoined: *Roudanez v. New Orleans*, 29 La. An. 271.

² See *Mandeville v. Riggs*, 2 Pet. 482; *Dodge v. Woolsey*, 18 How. 331; *Douglass v. Placerville*, 18 Cal. 643; *Bradford v. San Francisco*, 112 Cal. 537; *New London v. Brainard*, 22 Conn. 552; *Webster v. Harwinton*, 32 Conn. 131; *Terrett v. Sharon*, 34 Conn. 105; *Colton v. Hanchett*, 13 Ill. 615; *Drake v. Phillips*, 40 Ill. 388; *Lafayette v. Cox*, 5 Ind. 38; *Oliver v. Keightley*, 24 Ind. 514; *McMillan v. Lee County*, 3 Iowa 311; *Rice v. Smith*, 9 Iowa 570; *Grant v. Davenport*, 36 Iowa 396; *Fleming v. Mershon*, 36 Iowa 413; *Reynolds v. Waterville*, 92 Me. 292;

The holding of an election to vote upon a tax which, it is claimed, will be illegal if laid, will not be enjoined.¹ And in the absence of remedies at law chancery will inquire into the validity of an election previously held, in so far as the authority to levy and collect a land tax is derived therefrom.² But whether a tax for a purpose embraced in a municipal charter is necessary, the courts will not determine.³ Nor will the action of the proper authorities be restrained on the ground that they are voting more than is necessary for the purpose,⁴ or on an allegation that there is an intent to appropriate some part of the sum voted to a purpose not authorized by law;⁵ or because complainant is injured by unreasonable

Baltimore v. Gill, 31 Md. 375; Curtenius v. Hoyt, 37 Mich. 583; Dodge v. Van Buren Circuit Judge, 118 Mich. 189; Hodgman v. Chicago, etc. R. Co., 20 Minn. 48; Sumner v. St. Paul, 23 Minn. 408; Hooper v. Ely, 46 Mo. 505; Steines v. Franklin County, 48 Mo. 167; Tukey v. Omaha, 54 Neb. 370; Barr v. Deniston, 19 N. H. 170; Merrill v. Plainfield, 45 N. H. 126; Gifford v. New Jersey R. Co., 10 N. J. Eq. 171; Counterman v. Dublin, 38 Ohio St. 515; Sharpless v. Philadelphia, 21 Pa. St. 147; Page v. Allen, 58 Pa. St. 338; Stevens v. Rutland, etc. R. Co., 29 Vt. 545; Wade v. Richmond, 18 Grat. 583; Kyes v. St. Croix County, 108 Wis. 136. See, also, Gray v. Chapin, 2 Sim. & Stu. 267; Bromley v. Smith, 1 Sim. 8. For a statutory remedy now given to taxpayers in New York, see Ayers v. Lawrence, 59 N. Y. 192.

¹ Roudanez v. New Orleans, 29 La. An. 271.

² Pickett v. Russell (Fla.), 28 South. Rep. 764.

³ Hawkins v. Jonesboro, 63 Ga. 527.

⁴ Wharton v. School Directors, 42 Pa. St. 358. Where the levy of a tax for school purposes is prop-

erly made, and is within the statutory limit, collection cannot be enjoined on the ground that the levy is unnecessarily large, or that the directors proposed to divert part of the money to another purpose: Lawrence v. Trainer, 136 Ill. 474. A village which has charter power to obtain a supply of water will not be enjoined from levying a tax to increase its present supply, alleged to be ample. The extent of the use of such power, if exercised in good faith, rests in the discretion of the voters, and the question of expediency is for the municipality, and not for the courts: Lucia v. Montpelier, 60 Vt. 534.

⁵ Bardrick v. Dillon, 7 Okl. 535; Truesdell's Appeal, 58 Pa. St. 148. The principle was involved in Morgan v. Graham, 1 Woods 124, in which it was attempted to restrain state officers from issuing bonds under what was alleged to be an unconstitutional law. It was held in Armstrong v. Taylor County Court, 41 W. Va. 602, that an order laying a county levy will not be enjoined merely because some of the allowances included therein were illegal.

delay in doing the work for which the tax is laid.¹ Nor can the making of an assessment be enjoined, the act being judicial,² nor the selection of a particular business for taxation, the act being legislative.³ But the execution of a contract for a public improvement, which contract is illegal because it stipulates that the contractor shall employ none but union labor, may be enjoined at the instance of a taxpayer.⁴

It has been held that an injunction which restrains the extension and collection of a tax because of a want of power in a town meeting to levy it, enjoins the levy and collection, and the right to use the taxes collected.⁵ And where suit was brought to enjoin the collection of a school tax in favor of which the taxpayers had voted, the court said it would not consider the number of persons in favor of or opposed to the tax at the time the suit was commenced, nor how much the district would gain or lose if the tax were enjoined.⁶

Where a bill is filed to restrain the collection of a tax, or to have a tax declared void, the municipality concerned should be joined as a defendant.⁷

¹ *Whiting v. Boston*, 106 Mass. 89.

² *Western R. Co. v. Nolan*, 48 N. Y. 513.

³ *Ex parte Schmidt*, 2 Tex. App. 196.

⁴ *Adams v. Brennan*, 177 Ill. 194. The jurisdictional amount in chancery being \$100, a taxpayer cannot have a city enjoined from letting a paving contract, where his tax for the improvement is only forty cents: *Detroit v. Wayne Circuit Judges* (Mich.), 87 N. W. Rep. 376.

⁵ *Drummer v. Cox*, 165 Ill. 648.

⁶ *Vaughn v. School Dist.*, 27 Or. 57.

⁷ See *Pickett v. Russell* (Fla.), 28 South. Rep. 764; *Heinroth v. Kochersperger*, 173 Ill. 205; *Knopf v. Chicago Real Estate Board*, 173 Ill. 196; *Knopf v. First Nat. Bank*, 173 Ill. 331; *Hays v. Hill*, 17 Kan. 360; *Voss v. School Dist.*, 18 Kan.

467; *Atchison, etc. R. Co. v. Wilhelm*, 33 Kan. 206; *Gaither v. Green*, 40 La. An. 362; *Adams v. Auditor-General*, 43 Mich. 453. In Kansas the board of county commissioners is a necessary party to a suit to enjoin the collection of taxes due the county, or to the political subdivisions of which it is the legal representative in matters of tax collection: *Shearer v. Murphy* (Kan.), 66 Pac. Rep. 240. It was held in *Davis v. Lake Shore & M. S. R. Co.*, 114 Ind. 364, that an action to enjoin the sale of property under a void assessment for the repair of a public ditch is properly brought against the county treasurer, without making the county a party defendant. In *Cohn v. Parcels*, 72 Cal. 367, it was held that where assessments for the expense of a street widening go to a special fund, and where the city, under its charter, is not li-

Proceedings to restrain municipal action of any description ought to be prompt, as confusion in public action is likely to be caused by it. It has been held in Massachusetts that persons taxed for school purposes, when the district has been illegally constituted, may unite in a bill to restrain the collection of the tax, notwithstanding a delay of thirteen months since the illegal action to establish the district, and notwithstanding in the meantime a tax has been levied and collected, and other important action has been had by the district.¹ In Michigan, after several years had elapsed, the court refused to permit the regularity of the organization to be attacked in equity, and the cases referred to in the opinion tend strongly in the direction of holding that, on grounds of public policy, it should not be suffered, even after a short delay, if the district, in the meantime, had become peaceably organized, and was in the exercise of authority as such.²

What is above said regarding unlawful municipal action in certain cases will apply in all others in which individual citizens are wronged. A taxpayer may therefore file a bill to restrain tax proceedings against himself where he has been unlawfully set off from one municipality into another.³

able in damages for land condemned, the city is not a necessary party to a suit to restrain a tax-collector from enforcing an assessment. It was decided in *Pool v. Evans*, 57 S. C. 78, that the state is not a necessary party to an action by one whose land has been sold to it for non-payment of taxes, to vacate a subsequent deed thereof obtained by defendant from the state by fraud.

¹ *Holmes v. Baker*, 16 Gray 259. The opinion barely refers to the delay, saying that "The plaintiffs have been guilty of no delay or negligence which should deprive them of a remedy by injunction against the future illegal proceedings of the defendant."

² *Stuart v. Kalamazoo*, 30 Mich. 69, citing *People v. Maynard*, 15

Mich. 463; *Fractional School Dist. v. Joint Board*, 27 Mich. 3. And see further on the same subject, *Calkins v. Spraker*, 26 Ill. App. 159; *Glover v. Terre Haute*, 129 Ind. 593; *Atchison, etc. R. Co. v. Wilson*, 33 Kan. 223; *Lake Charles v. Police Jury*, 50 La. An. 346; *Dees v. Lake Charles*, 50 La. An. 356; *South Platte Land Co. v. Buffalo County*, 15 Neb. 605; *McClay v. Lincoln*, 32 Neb. 412; *Lancaster County v. Rush*, 35 Neb. 120; *Sage v. Plattsmouth*, 48 Neb. 558; *Brennan v. Bradshaw*, 53 Tex. 330; *Graham v. Greenville*, 67 Tex. 63; *Lum v. Bowie (Tex.)*, 18 S. W. Rep. 142; *Troutman v. McClesky*, 7 Tex. Civ. App. 561; *Frace v. Tacoma*, 12 Wash. 605.

³ *Simpkins v. Ward*, 45 Mich. 559. See *School Directors v.*

Irregular taxation. A tax will not be restrained on the ground merely that it is irregular or erroneous. Errors in the assessment do not render the tax void, nor are they necessarily injurious. As a rule, therefore, they do not constitute any reason whatever against the taxes being enforced. Moreover, the law has provided remedies for all such mere irregularities and errors as do not go to the foundation of the tax, and parties complaining must be confined to these.¹ The cases cited

School Directors, 135 Ill. 464; Peru v. Bearss, 55 Ind. 576; Windman v. Vincennes, 58 Ind. 480. Injunction is the landowner's proper remedy against the collection by a school district of a tax on land which it had no jurisdiction to tax: Arthur v. School District, 164 Pa. St. 410. Where a town cut off from another is by statute made absolutely liable for its proportion of the indebtedness of the latter, and afterwards by a proper vote of the new town the amount to be paid to the old is definitely settled, the court will refuse to enjoin, at the instance of a taxpayer in the new town, the collection of a tax levied for the purpose of paying such amount, there being no showing that the amount assessed against him is inequitable, though the tax may be void at law for want of a vote to levy it: Hixon v. Oneida County, 82 Wis. 515.

¹ Wagoner v. Lewis, 37 Ohio St. 571. It is not enough that a tax is irregular and void; it must also appear that it is inequitable: Hixon v. Oneida County, 82 Wis. 515; Hayes v. Douglas County, 92 Wis. 429; Chicago & N. W. R. Co. v. Forest County, 95 Wis. 80. To justify enjoining an illegal tax the illegality must go to the very root and substance of the tax, as would a failure to observe the

equality provision of the constitution: London v. Wilmington, 78 N. C. 109. See Delphi v. Bowen, 61 Ind. 29; Brandirff v. Harrison County, 50 Iowa 154. If proceedings for the construction of a public ditch are absolutely void, a suit to enjoin the collection of an assessment for constructing it will lie, but if not void plaintiff cannot prevail, no matter how erroneous or irregular the proceedings were. In such a suit the owner cannot have an assessment of benefits reviewed: Studabaker v. Studabaker, 152 Ind. 89. Where plaintiff was taxed for part of his personalty, which was also regularly assessed elsewhere, this was held to be merely a case of irregular assessment, and the remedy was before the board of equalization: Harris v. Fremont County, 63 Iowa 639. If suit is brought for a tax, defense must be made to it there, and equity will not take cognizance of subsequent complaints: Utah, etc. R. Co. v. Crawford, 1 Idaho (N. S.) 770. If an inferior tribunal decides that it has jurisdiction of proceedings ending in a tax levy, objections to the ruling cannot be taken for the first time in proceedings to enjoin the tax: Reynolds v. Faris, 80 Ind. 14. And see *ante*, p. 1412.

in the margin will show the application of this rule in a great variety of cases.¹ "The power of the chancellor to restrain the collection of revenue is one that should never be exercised but in cases where the tax is levied on property exempt from

¹ Dows v. Chicago, 11 Wall. 108; Strenna v. Montgomery City Council, 86 Ala. 340; Western Banking Co. v. Murray (Ariz.), 56 Pac. Rep. 728; Merrill v. Gorham, 6 Cal. 41; Dodd v. Hartford, 25 Conn. 232; Frost v. Flick, 1 Dak. 131; Ottawa v. Walker, 21 Ill. 605; Chicago, etc. R. Co. v. Frary, 22 Ill. 34; Metz v. Anderson, 23 Ill. 410; Purrington v. People, 79 Ill. 11; Rossiter v. Lake Forest, 151 Ill. 489; Craft v. Kochersperger, 173 Ill. 617; Jones v. Summer, 27 Ind. 510; Center, etc. Co. v. Black, 32 Ind. 468; Brown v. Herron, 59 Ind. 61; Aurora v. Lamar, 59 Ind. 400; Stilz v. Indianapolis, 81 Ind. 582; Worley v. Harris, 82 Ind. 493; Cauldwell v. Curry, 93 Ind. 363; Reynolds v. Bowen, 138 Ind. 434; Bowen v. Hester, 143 Ind. 511; Schrack v. Covault, 144 Ind. 260; Hunter Stone Co. v. Woodard, 152 Ind. 474; Layman v. Hughes, 152 Ind. 484; Miller v. Vollmer, 153 Ind. 26; Crowder v. Riggs, 153 Ind. 158; Cleveland, C., C. & St. L. R. Co. v. Waynetown, 153 Ind. 550; Sarber v. Rankin, 154 Ind. 236; Marklot v. Davenport, 17 Iowa 379; West v. Whitaker, 37 Iowa 598; Iowa, etc. Land Co. v. Sac County, 39 Iowa 124; Iowa, etc. Land Co. v. Carroll County, 39 Iowa 151; Litchfield v. Hamilton County, 40 Iowa 66; Patterson v. Baumer, 43 Iowa 477; Kansas Pac. R. Co. v. Russel, 8 Kan. 558; Smith v. Leavenworth, 9 Kan. 296; Lawrence v. Killam, 11 Kan. 499; Challis v. Atchison County, 15 Kan. 49; Stebbins v. Challis, 15 Kan. 55; Kansas Mut. L. Assoc. v. Hill, 51

Kan. 636; Dutton v. Citizens' Nat. Bank, 53 Kan. 462; Chicago, B. & Q. R. Co. v. Norton County Clerk, 55 Kan. 386; O'Neal v. Virginia, etc. Co., 18 Md. 1; Albany, etc. Mining Co. v. Auditor-General, 37 Mich. 391; Sinclair v. Learned, 57 Mich. 335; Duffy v. Saginaw, 106 Mich. 335; Nelson v. Campbell, 106 Mich. 659; Tuller v. Detroit, 126 Mich. 605; St. Louis & S. F. R. Co. v. Gracy, 126 Mo. 472; State v. Fullerton, 143 Mo. 682; Dickhaus v. Alderheide, 22 Mo. App. 76; Deloughrey v. Hinds, 23 Mo. 260; Dundy v. Richardson County, 8 Neb. 508; Redick v. Omaha, 35 Neb. 125; Spargur v. Romine, 38 Neb. 736; Bellevue Imp. Co. v. Bellevue, 39 Neb. 876; Rothwell v. Knox County (Neb.), 86 N. W. Rep. 903; Perley v. Doll-off, 60 N. H. 504; Brooklyn v. Messerole, 26 Wend. 132; Denise v. Fairport, 11 Misc. Rep. 199, 32 N. Y. Supp. 97; Wilson v. Auburn, 27 Neb. 435; Covington v. Rockingham, 93 N. C. 134; McDonald v. Teague, 119 N. C. 604; Farrington v. New England Inv. Co., 1 N. D. 102; Commissioners v. Krauss, 53 Ohio St. 628; Sweet v. Boyd, 6 Okl. 699; Boyd v. Wiggins, 7 Okl. 85; Portland Hibernian Ben. Soc. v. Kelly, 28 Or. 173; Hughes v. Kline, 30 Pa. St. 227; Clinton, etc. Appeal, 56 Pa. St. 315; Greene v. Mumford, 5 R. I. 472; State v. Bremond, 38 Tex. 116; Harrison v. Vines, 46 Tex. 15; Mills v. Gleason, 11 Wis. 470; Mills v. Johnson, 17 Wis. 598; Kaehler v. Dobberpuhl, 56 Wis. 480; Hixon v. Oneida County, 82 Wis. 515;

taxation, where it is doubly taxed, where it is levied without any warrant of law by persons having no power to make the levy, or where a clear case of fraud in making the valuation of the property is shown. But in the latter case the proof must be clear and irresistible, and the injury likely to be produced considerable."¹ Even where the error is one which might be damaging, like the failure of a review board to meet,

Wells v. Western Paving, etc. Co., 96 Wis. 116; *Gleason v. Waukesha County*, 103 Wis. 225. That an assessment is technically in the wrong name does not justify the equitable relief by injunction: *New Orleans v. Stempel*, 175 U. S. 309. See *Portland Hibernian Ben. Soc. v. Kelly*, 28 Or. 173. If a tax-deed is given on a judicial sale it will not be enjoined for errors, before judgment: *Moore v. Wayman*, 107 Ill. 192. While the assessment record should show the increased valuation of the different kinds of property as made by the board of review, and not merely the increased valuation of one-fifth of the total, yet the omission of such showing is not ground for enjoining the collection of the tax: *American Express Co. v. Raymond*, 189 Ill. 232. The objection that proceedings of the board of review were irregular in not taking sworn testimony, and in using information as to complainant's commercial rating, were held no ground for enjoining the collection of the tax: *Pratt v. Raymond*, 188 Ill. 469. Whether the yeas and nays were taken on the passage of an ordinance ordering the improvement of a street, or whether the description of the property assessed is correct, cannot be considered in a suit for injunction: *Balfe v. Lammers*, 109 Ind. 347. Where it does not appear that persons whose lands

were assessed were not given notice in time to appeal they cannot maintain an injunction on the ground of irregularities: *Trimble v. McGee*, 112 Ind. 307; *Wisman v. McGee*, 112 Ind. 600. An irregularity in an assessment for a ditch is not available to restrain an assessment for repairing it: *Davis v. Lake Shore & M. S. R. Co.*, 114 Ind. 364. Nor will such an assessment be enjoined on the ground that the work on the ditch was not completed agreeably to the plans and specifications: *Studabaker v. Studabaker*, 152 Ind. 89. After a school-house has been erected and a tax voted to pay for the same, a taxpayer cannot have the tax enjoined on the ground of preliminaries to the building contract: *Casey v. School Dist.*, 64 Iowa 659. Where separate lots, belonging to the same owner have been assessed in gross, a sale of them for the taxes will not be enjoined in equity: *Deloughrey v. Hinds*, 23 Mont. 260; *Cobban v. Hinds*, 23 Mont. 338. A tax will not be restrained in equity on the ground that the resolution of a town for raising it failed to designate the particular purpose for which it was raised: *Chicago & N. W. R. Co. v. Forest County*, 95 Wis. 80.

¹ *Union Trust Co. v. Weber*, 96 Ill. 346. See *Lemont v. Singer, etc. Co.*, 98 Ill. 94.

the tax will not be enjoined without some showing that injury resulted.¹ Nor even then except to the extent of the injury.²

It is not, however, a mere irregularity when one is denied his legal right to work out a road tax, and the amount is demanded in money;³ nor when a tax once paid is demanded a

¹ *Mercantile Nat. Bank v. Hubbard*, 98 Fed. Rep. 465; *Savings & L. Soc. v. Ordway*, 38 Cal. 679; *Frost v. Flick*, 1 Dak. 131; *Foresman v. Chase*, 68 Ind. 500; *Carroll County v. Graham*, 98 Ind. 279; *Miller v. Vollsner*, 153 Ind. 26; *Crowder v. Riggs*, 153 Ind. 158; *Sioux, etc. R. Co. v. Osceola County*, 45 Iowa 168; *Wilson v. Cass County*, 69 Iowa 147; *Ryan v. Leavenworth County*, 30 Kan. 185; *Anderson v. Mayfield*, 93 Ky. 230; *Chawk v. Beville (Ky.)*, 56 S. W. Rep. 414; *Albany, etc. Mining Co. v. Auditor-General*, 37 Mich. 391; *Burt v. Auditor-General*, 39 Mich. 126; *Casey v. Wright*, 14 Mont. 315; *Dundy v. Richardson County*, 8 Neb. 508; *South Platte Land Co. v. Crete*, 11 Neb. 344; *Burlington, etc. R. Co. v. Cass County*, 16 Neb. 136; *McIntyre v. White Creek*, 46 Wis. 20. Equity will not relieve on the ground of a very slight excess in the levy: *Smith v. Leavenworth*, 9 Kan. 296. Where a city lot assessed only \$2.50 for a street improvement is sold for non-payment, and where the owner can redeem by paying \$3.90, the maxim *de minimis* applies, and equity will not restrain the execution of a deed pursuant to such sale, if invalid: *Mietzsch v. Berkhout (Cal.)*, 35 Pac. Rep. 321. That the board of review, without sufficient evidence, made a trifling increase in the valuation of certain lands for purposes of taxation, is not ground for enjoining the collection of the taxes, but the

taxpayer will be left to his legal remedy: *Hixon v. Oneida County*, 82 Wis. 515. If a board of review which has power to increase an assessment on notice does so without notice, the tax will not be enjoined without proof of substantial injustice: *McIntyre v. White Creek*, 43 Wis. 620. The mere failure to verify an assessment does not establish the fact of inequality or injustice. To warrant an injunction injustice should appear, and the party should offer to pay what is right: *Fifield v. Marinette County*, 62 Wis. 532, criticising *Marsh v. Supervisors*, 42 Wis. 517. It was held in *Bellevue Imp. Co. v. Bellevue*, 39 Neb. 876, following *South Platte Land Co. v. Crete*, 11 Neb. 344, and *Wood v. Helmer*, 10 Neb. 65, that the collection of taxes would not be enjoined because the assessment was not based on the assessor's judgment, or because he did not make oath to the assessment roll.

² *London v. Wilmington*, 78 N. C. 109; *Huck v. Railroad Co.*, 86 Ill. 352; *Ricketts v. Spraker*, 77 Ind. 371. See *Tampa v. Mugge*, 40 Fla. 326; *Shepardson v. Gillett*, 133 Ind. 125; *Pillsbury v. Auditor-General*, 26 Mich. 245; *Petition of Hughes*, 93 N. Y. 512.

³ *Chicago & N. W. R. Co. v. People*, 171 Ill. 525; *Sioux, etc. R. Co. v. Osceola County*, 45 Iowa 168; *Miller v. Gorman*, 38 Pa. St. 309; *Biss v. New Haven*, 42 Wis. 605.

second time;¹ nor when property is unlawfully exempted from taxation, thereby increasing the burden upon complainant;² nor when property, which is exempt from taxation by law, is assessed;³ nor when one's assessment has been increased without giving him the notice to which by law he is entitled.⁴ In all these cases the party taxed is denied a substantial right, or his tax is unlawfully increased beyond his due proportion, and his right to an adequate remedy is unquestionable. If, however, the tax is a personal tax only, it will appear from the references to decisions which have already been made, that in a majority of the states the remedy by injunction would not be given, and the party would be turned over to his suit at law.⁵ That irregularities are feared is no ground for injunction.⁶ And irregularities will not be presumed.⁷

¹ *Commonwealth v. Colley Supervisors*, 29 Pa. St. 121. To entitle one to relief from double taxation, it must appear that he has paid once: *Savings & L. Soc. v. Austin*, 46 Cal. 415. So, one who has not paid either a municipal assessment or the subsequent re-assessment will not be heard to deny the validity of the re-assessment on the ground that the original assessment was valid: *Port Angeles v. Lauridsen* (Wash.), 66 Pac. Rep. 403.

² *Illinois Central R. Co. v. McLean County*, 17 Ill. 291; *Mott v. Pennsylvania R. Co.*, 30 Pa. St. 9. See what is said on this subject, *ante*, chapter VI.

³ *Norris, etc. Co. v. Jersey City*, 1 Beas. Ch. 227; *Jones v. Davis*, 35 Ohio St. 474. Equity will not enjoin the collection of a tax on personal property that has been converted into non-taxable to avoid taxation: *Crowder v. Riggs*, 153 Ind. 158. A petition to enjoin the levy of taxes on property which is only in part exempt from taxation must show to what

extent the property is exempt: *Louisville v. Louisville Board of Trade*, 90 Ky. 409.

⁴ *Cleghorn v. Postlewaite*, 43 Ill. 428; *Darling v. Gunn*, 50 Ill. 424; *Glassford v. Dorsey*, 2 Ill. App. 521; *Alabama & V. R. Co. v. Brennan*, 69 Miss. 103. If the increase is by unauthorized persons the tax as to the excess will be restrained: *Coolbaugh v. Huck*, 86 Ill. 600.

⁵ See *ante*, p. 1415.

⁶ *Louisville, etc. R. Co. v. Bate*, 22 Fed. Rep. 480. The fact that the notice under which a tax-sale was threatened was published only three weeks was held not to authorize enjoining the collection of the tax: *Cobban v. Hinds*, 23 Mont. 338. If a city has authority to enjoin from continuing his business one who fails to pay his license tax, such person cannot enjoin the city from collecting the tax: *New Orleans v. Becker*, 31 La. An. 644; *Goldsmith v. New Orleans*, 31 La. An. 646.

⁷ *Moore v. Albany*, 98 N. Y. 396.

Excessive assessments. While an excessive levy may be enjoined,¹ yet for excessive assessments where fraud is not charged there can, generally speaking, be no relief in equity. The remedy must be such as the statute has given.² But an

¹ See *Binkert v. Jansen*, 94 Ill. 283; *Miles v. Ray*, 100 Ind. 166; *Burlington, etc. R. Co. v. Saunders County*, 16 Neb. 123; *St. Clair School Board's Appeal*, 74 Pa. St. 252. But a tax for a proper purpose in excess of the legal limit should be upheld as far as legal: *Whitney Nat. Bank v. Parker*, 41 Fed. Rep. 402; *McPherson v. Foster*, 43 Iowa 48. And where a levy is made in excess of the legal limit injunction will lie against the part only which is illegal: *Lewis v. Bogue Chitto*, 76 Miss. 356. Levy of an assessment for a special improvement in excess of the legal limit, collection of excess enjoined: *Cincinnati v. James*, 55 Ohio St. 180; *Birdseye v. Clyde*, 61 Ohio St. 27. See *Wells v. Western Paving, etc. Co.*, 96 Wis. 116. As to the proof necessary to make out an excessive school tax, see *Gage v. Bailey*, 102 Ill. 11.

² *Hazard v. O'Bannon*, 38 Fed. Rep. 220; *Washington Market Co. v. District of Columbia*, 4 Mackey 416; *New York & C. G. etc. Exchange v. Gleason*, 121 Ill. 502; *People v. Ashley Lots*, 122 Ill. 279; *La Salle & P. H. & D. R. Co. v. Donoghue*, 127 Ill. 27; *Kinley Manuf. Co. v. Kochersperger*, 174 Ill. 379; *New Haven Clock Co. v. Kochersperger*, 175 Ill. 383; *Coxe Bros. & Co. v. Salomon*, 188 Ill. 571; *Bloomington v. Blodgett*, 24 Ill. App. 650; *Small v. Lawrenceburgh*, 128 Ind. 231; *Royer Wheel Co. v. Taylor County (Ky.)*, 47 S. W. Rep. 876; *Noxubee County v. Ames (Miss.)*, 3 South. Rep. 37; *Albuquerque Nat. Bank v. Perea*

(N. M.), 25 Pac. Rep. 776; *Delaware & H. Canal Co. v. Atkins*, 121 N. Y. 246; *Kimber v. Schuylkill County*, 20 Pa. St. 366; *Hughes v. Kline*, 30 Pa. St. 227; *Everitt's Appeal*, 71 Pa. St. 216; *Hutchinson v. Pittsburgh*, 72 Pa. St. 320. Excessive assessments should be corrected by the course provided by law for such correction, or, where overvaluation has arisen from the adoption of a rule of appraisal which conflicts with a constitutional or statutory provision, by resorting to equity to enjoin the collection of the excess upon payment or tender of the amount due upon a just valuation: *Stanley v. Albany Supervisors*, 121 U. S. 535. In a suit to restrain collection an assessment cannot be attacked as in excess of proportionate benefits, where there was no claim that any land benefited was not assessed, or that there was any fraud in making the assessment: *Hoffeld v. Buffalo*, 130 N. Y. 387. Chancery cannot set aside a city tax sale as invalid because the amount of the taxes for which the lands were sold was excessive. The remedy is in direct proceedings by *certiorari* to the supreme court, to which the city is a party: *Devine v. Franks (N. J. Eq.)*, 47 Atl. Rep. 228. A taxpayer who, in making up his schedule, has failed to deduct his debts, cannot have the collection of taxes on his entire credits enjoined: *Morris v. Jones*, 150 Ill. 542. Courts will not relieve from the payment of interest and penal-

injunction would seem to be the proper remedy where a town makes discriminations in the discounts on taxes, this not rendering the tax illegal.¹ In Pennsylvania an injunction has been granted restraining the collection of taxes where city assessors had made an assessment for city purposes greatly in excess of the triennial assessment for state and county purposes made the previous year.² It has been held in South Dakota that a property owner who has tendered payment of the taxes on his property computed on its legal assessment may enjoin the collection of an excess.³ In the state of Washington the conclusion has been reached that the statute providing a remedy against excessive taxes by objections to the rendition of a judgment therefor is not conclusive, and that a taxpayer whose property has been assessed excessively may invoke the aid of equity to compel the tax officers to receive the sum legally due, and to enjoin the collection of more.⁴ And in

ties on the ground of the party's title having been in dispute: *Litchfield v. Hamilton County*, 40 Iowa 66. But they may relieve where the penalty is unauthorized and excessive: *Litchfield v. Webster County*, 101 U. S. 773. It is held in Florida that an assessment for taxes will not be declared unlawful as a whole if illegal items are separable from legal ones: *Pensacola v. Louisville & N. R. Co.*, 21 Fla. 492. When the valid part of a tax can be easily distinguished from that which is claimed to be invalid, and it has neither been paid nor tendered, the collection of the tax will not be enjoined pending a litigation to determine the validity of the disputed part: *Breeze v. Haley*, 11 Colo. 351. For the power of the New Jersey courts under the statute authorizing the apportionment of a tax, see *Press Printing Co. v. State Board*, 51 N. J. L. 75; *Mayer v. Jersey City*, 61 N. J. L. 473. The federal supreme court cannot inquire whether or not the esti-

mated value of land for state taxation is excessive, and cannot correct errors and mistakes of detail in state taxation: *Davidson v. New Orleans*, 96 U. S. 97; *Kelly v. Pittsburgh*, 104 U. S. 78; *Spencer v. Merchant*, 125 U. S. 345.

¹ *Toby v. Wareham*, 2 Allen 594.

² *Kemble's Appeal*, 135 Pa. St. 141.

³ *Dakota Loan, etc. Co. v. Codrington*, 9 S. D. 159, distinguishing *Frost v. Flick*, 1 Dak. 126, where "the taxpayer sought to restrain the collection of what he ought to have paid." Where part of a tax is legal and a part illegal the entire assessment does not fail if it is separable: *Tampa v. Mugge*, 40 Fla. 326. A legal charge will not be enjoined in order to put off that which may be legal: *Pillsbury v. Auditor-General*, 26 Mich. 245. See *Shepardson v. Gillett*, 133 Ind. 125; *Petition of Hughes*, 93 N. Y. 512.

⁴ *Benn v. Chehalis County*, 10 Wash. 294. Where realty is im-

Oklahoma that part of a tax which is invalid because of an unauthorized increase in the assessed valuation of the complainant's property by the board of assessors will be restrained.¹

Equity cannot give relief against an assessment for taxation in consideration of the great depreciation in value resulting from public causes, *e. g.*, a rebellion. Such a consideration might appropriately be addressed to the legislative department, but not to the judicial.²

Accident or mistake. Equity will not relieve a land-owner from a lien for taxes merely because he did not know of the assessment, and had no opportunity to discharge the tax,³ but a taxpayer's conduct in listing, by mistake of fact, property for taxation, will not estop him from seeking to have the collection of taxes restrained on the ground that the property is not within the taxing district.⁴

Tax upon lands; cloud on title. When a tax is assessed against a person in respect of his ownership of lands, and is a personal charge upon him, and not a lien upon the lands, there can be no grounds for equitable interference which would not exist in the case of a tax assessed upon personalty.⁵ In those states in which a personal tax would be restrained, if illegal, a tax upon land constituting a personal charge would be restrained also. In other states it would not be, unless some special ground of equity jurisdiction appeared.

properly included in a description of premises for taxation, the court, under the statute relating to suits to restrain the collection of taxes, may deduct from the tax an amount in the proportion that the tract improperly included bears to the whole part: *Coolidge v. Pierce County* (Wash.), 68 Pac. Rep. 391.

¹ *Weber v. Dillon*, 7 Okl. 568; *Bardrick v. Dillon*, 7 Okl. 535; *Cranmer v. Williamson*, 8 Okl. 683. As to what the party seeking injunction must allege and show, see *Martin v. Clay*, 8 Okl.

46; *Streight v. Durham* (Okl.), 61 Pac. Rep. 1096; *Alva State Bank v. Renfrew* (Okl.), 62 Pac. Rep. 285.

² *White Sulphur Springs Co. v. Robinson*, 3 W. Va. 542.

³ *Cobban v. Hinds*, 23 Mont. 332.

⁴ *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369.

⁵ See *Brewer v. Springfield*, 97 Mass. 152; *Hunnewell v. Charlestown*, 106 Mass. 350; *Norton v. Boston*, 119 Mass. 114; *Williams v. Detroit*, 2 Mich. 560; *Henry v. Gregory*, 29 Mich. 68; *Greene v. Mumford*, 5 R. I. 474.

If the tax is a lien upon lands, it may then constitute a cloud upon the title; and one branch of equity jurisdiction is the removal of apparent clouds upon the title, which may diminish the market value of the land, and threaten a possible loss of it to the owner.¹ A cloud upon one's title is something which constitutes an apparent incumbrance upon it, or an apparent defect in it; something that shows *prima facie* some right of a third party, either to the whole or some interest in it.² An illegal tax may or may not constitute such a cloud. If the alleged tax has no semblance of legality; if, upon the face of the proceedings, it is wholly unwarranted by law, or for any reason totally void, so that any person inspecting the record and comparing it with the law is at once apprised of the illegality, the tax, it would seem, could neither constitute an incumbrance, nor an apparent defect of title; and, therefore, in law, could constitute no cloud. If this be so, the jurisdiction which is exercised by courts of equity, to relieve parties by removing clouds upon their titles, could not attach in such a case. This has been held in many cases.³ The case of an assessment

¹ In *Boyd v. Selma*, 96 Ala. 144, it was held that where the law affords an adequate remedy for illegal taxation, equity will not interfere on the ground merely that the tax has the effect of a permanent judgment and operates as a cloud upon the title.

² See *Sanders v. Yonkers*, 63 N. Y. 489; *Temple Grove Seminary v. Cramer*, 98 N. Y. 121. "To constitute such a cloud on title as will warrant equity in restraining the issue of a tax-deed, it must appear that the owner of the property, in an action of ejectment by the adverse party, founded in the deed would have to offer evidence to defeat a recovery:" *Russ & Sons Co. v. Crichton*, 117 Cal. 695. There is no cloud upon title when the facts which are relied on to show it are not such as *per se* to convey an apparent right, title, or interest in the property: *Gilman v. Van Brunt*, 29 Minn.

271. See *O'Mulcahy v. Florer*, 27 Minn. 449.

³ *Ewing v. St. Louis*, 5 Wall. 413; *Hannewinkle v. Georgetown*, 15 Wall. 547; *Mobile, etc. R. Co. v. Peebles*, 47 Ala. 317; *Rea v. Longstreet*, 54 Ala. 294; *Farrent Fire Eng. Co. v. Mobile*, 101 Ala. 559; *Parker v. Boutwell*, 119 Ala. 297; *Floyd v. Gilbreath*, 27 Ark. 675; *Crane v. Randolph*, 30 Ark. 579; *Bucknall v. Story*, 36 Cal. 67; *Robinson v. Gaar*, 56 Cal. 273; *Chase v. City Treasurer*, 122 Cal. 540; *Harkness v. Board of Pub. Works*, 1 MacA. 121; *Briggs v. Johnson*, 71 Me. 235; *Detroit v. Martin*, 34 Mich. 170; *Curtis v. East Saginaw*, 35 Mich. 508; *Eddy v. Lee T'p*, 73 Mich. 123; *Eastman v. Thayer*, 60 N. H. 408; *Messerole v. Brooklyn*, 8 Paige 198; *Wiggin v. New York*, 9 Paige 16; *Van Doren v. New York*, 9 Paige 388; *Cox v. Cleft*, 2 N. Y. 118; *Scott v. Onderdonk*, 14

made under an unconstitutional law is such a case,¹ and so is one in which two or more parcels of land appear by the record to have been sold together when the law forbids it.²

When, however, the illegality or fatal defect does not appear on the face of the record, but must be shown by evidence *aliunde*, so that the record would make out a *prima facie* right in one who should become purchaser, and the evidence to rebut this case may possibly be lost, or be unavailable from death of witnesses or other cause, or when the deed given on a sale of the lands for the tax would, by statute, be presumptive evidence of a good title in the purchaser, so that the purchaser might rely upon that for a recovery of the lands until the illegalities were shown, the courts of equity regard the case as coming within their ordinary jurisdiction, and have extended relief on the ground that a cloud on the title existed or was

N. Y. 9; Hatch v. Buffalo, 38 N. Y. 276; Newell v. Wheeler, 48 N. Y. 486; Monroe County v. Rochester, 154 N. Y. 570; Livingston v. Hollenbeck, 4 Barb. 9, 16; Van Rensselaer v. Kidd, 4 Barb. 17; Bouton v. Brooklyn, 15 Barb. 375; Busbee v. Lewis, 85 N. C. 332; Dean v. Madison, 9 Wis. 402; Mead v. James, 13 Wis. 641; Shepardson v. Milwaukee Supervisors, 28 Wis. 593; Milwaukee Iron Co. v. Hubbard, 29 Wis. 51. The fact that an assessment for constructing a sidewalk is made a lien on the lot in front of which the same is constructed does not create such a cloud on the title as to confer equitable jurisdiction to restrain the collection of an illegal tax: Wilson v. Philippi, 39 W. Va. 75. A court of equity cannot entertain an action to set aside an assessment as a cloud upon title after the assessment has been paid: Diefenthaler v. New York, 111 N. Y. 331. When a controller's certificate of sale shows illegality on its face, it will be presumed

he will give no deed upon it, and he will not be enjoined from doing so unless he threatens it: Clark v. Davenport, 95 N. Y. 478. Where the state university's property, which was clearly exempt, was taxed, and the tax could create no cloud, it was held that an injunction should not issue: Hollister v. Sherman, 63 Cal. 38.

¹ Wells v. Buffalo, 80 N. Y. 253; Townsend v. New York, 77 N. Y. 542 (citing many cases); Clark v. Davenport, 95 N. Y. 477; Conde v. Schenectady, 164 N. Y. 258; Nehasane Park Assoc. v. Lloyd, 167 N. Y. 431. An assessment declared void in one proceeding for want of authority in those who laid it must be considered void as to all other persons, and therefore no lien or cloud upon title: Chase v. Chase, 95 N. Y. 373.

² Lawrence v. Zimpleman, 37 Ark. 643. If the proceeding is illegal in part only, it may be set aside as to that part: Strusburgh v. New York, 87 N. Y. 552. See Gage v. Pumpelly, 115 U. S. 454.

imminent. The cases on this point are numerous, and in considerable variety, as would be anticipated in view of the different tax systems under which they have been made.¹ It has

- ¹ *Dows v. Chicago*, 11 Wall. 108; *Hannewinkle v. Georgetown*, 15 Wall. 547; *Lyon v. Alley*, 130 U. S. 177; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417; *Wilson v. Lambert*, 168 U. S. 611; *Huntington v. Central Pac. R. Co.*, 2 Sawy. 503; *Coulson v. Portland*, Deady 481; *California & O. L. Co. v. Gowen*, 48 Fed. Rep. 771; *Sanford v. Gregg*, 58 Fed. Rep. 620; *Meyers v. Shields*, 61 Fed. Rep. 713; *Gregg v. Sanford*, 65 Fed. Rep. 151, 12 C. C. A. 525, 28 U. S. App. 313; *Meyer v. Kuhn*, 65 Fed. Rep. 705, 13 C. C. A. 298, 25 U. S. App. 174; *Chaplin v. United States*, 29 Ct. Cl. 231; *McCormick v. District of Columbia*, 4 Mackey, 396; *Shell v. Martin*, 19 Ark. 139; *Chaplin v. Holmes*, 27 Ark. 414; *Greedup v. Franklin County*, 30 Ark. 101; *Vaughan v. Bowie*, 30 Ark. 278; *Hare v. Carnall*, 39 Ark. 196; *Weber v. San Francisco*, 1 Cal. 455; *Robinson v. Gaar*, 6 Cal. 273; *Harmer v. Boling*, 8 Cal. 384; *Hardenburg v. Kidd*, 10 Cal. 403; *Ritter v. Patch*, 12 Cal. 298; *Pixley v. Huggins*, 15 Cal. 127; *Burr v. Hunt*, 18 Cal. 303; *Arrington v. Liscom*, 34 Cal. 365; *Bucknall v. Story*, 36 Cal. 67; *Cohen v. Sharp*, 44 Cal. 29; *Houghton v. Austin*, 47 Cal. 646; *Woodruff v. Perry*, 103 Cal. 611; *Bolton v. Gilleran*, 105 Cal. 244; *Chase v. City Treasurer*, 122 Cal. 540; *Pickett v. Russell*, 42 Fla. — (28 South. Rep. 764); *Bramwell v. Gates*, 2 Idaho 1069; *Gage v. Rohrbach*, 56 Ill. 262; *Gage v. Billings*, 56 Ill. 268; *Reid v. Taylor*, 56 Ill. 288; *Gage v. Chapman*, 56 Ill. 311; *Barnett v. Cline*, 60 Ill. 205; *Reed v. Reber*, 62 Ill. 240; *Lee v. Ruggles*, 62 Ill. 427; *Ames v. Sankey*, 128 Ill. 523; *Harrison v. Haas*, 25 Ind. 281; *Yocum v. First National Bank*, 144 Ind. 272; *Rood v. Mitchell County*, 39 Iowa 444; *Lapp v. Morrill*, 8 Kan. 678; *Leigh v. Everhart's Ex'rs*, 4 T. B. Monr. 379; *Polk v. Rose*, 25 Md. 153; *Salisbury Perm. B. & L. Assoc. v. County Com'rs*, 86 Md. 615; *Russell v. Deshon*, 124 Mass. 342; *Davis v. Boston*, 129 Mass. 379; *Palmer v. Rich*, 12 Mich. 414; *Conway v. Waverley*, 15 Mich. 257; *Scotfield v. Lansing*, 17 Mich. 437; *Kenyon v. Duchene*, 21 Mich. 498; *Thomas v. Gain*, 35 Mich. 155; *Marquette, etc. R. Co. v. Marquette*, 35 Mich. 504; *Weller v. St. Paul*, 5 Minn. 95; *Morrison v. St. Paul*, 9 Minn. 108; *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468; *Sewall v. St. Paul*, 20 Minn. 511; *Mayall v. St. Paul*, 30 Minn. 294; *Lockwood v. St. Louis*, 24 Mo. 20; *Fowler v. St. Joseph*, 37 Mo. 228; *Mechanics' Bank v. Kansas City*, 73 Mo. 555; *Northern Pac. R. Co. v. Carland*, 5 Mont. 146; *Burlington, etc. R. Co. v. Clay County*, 13 Neb. 367; *Brooks v. Howland*, 58 N. H. 98; *Morris Canal, etc. Co. v. Jersey City*, 12 N. J. Eq. 227; *Albuquerque v. Zeiger*, 5 N. M. 674; *Pettit v. Shepherd*, 5 Paige 493; *Oakley v. Williamsburg Trustees*, 6 Paige 262; *Van Doren v. New York*, 9 Paige 388; *Moers v. Smedley*, 6 Johns. Ch. 28; *Scott v. Onderdonk*, 14 N. Y. 9; *Heywood v. Buffalo*, 14 N. Y. 534; *Ward v. Dewey*, 16 N. Y. 519; *Hatch v. Buffalo*, 38 N. Y. 276; *Allen v. Buffalo*, 39 N. Y. 386; *Crooke v. Andrews*, 40 N. Y.

been held in some cases that if the purchaser at a tax-sale must take upon himself the burden of showing the regularity of the proceedings, so that the deed itself is not *prima facie* evidence of title, the owner of the record title was sufficiently protected

547; Overing v. Foote, 43 N. Y. 290; Newell v. Wheeler, 48 N. Y. 486; King v. Townsend, 141 N. Y. 358; Sanders v. Downs, 141 N. Y. 422; Alvord v. Syracuse, 163 N. Y. 158; Hanlon v. Westchester Supervisors, 57 Barb. 383; Marvin v. Town, 56 Hun 510, 10 N. Y. Supp. 148; Smith v. Town, 65 Hun 622, 20 N. Y. Supp. 333; Copcutt v. Yonkers, 83 Hun 178, 31 N. Y. Supp. 659; Hughes v. Linn County, 37 Or. 111; Moores v. Clackamas County (Or.), 67 Pac. Rep. 662; Vesta Mills v. Charleston, 60 S. C. 1; Macomb v. Lake County, 9 S. D. 466; Ward v. Ward, 2 Hayw. 226; Alexander v. Henderson, 105 Tenn. 431; Cook v. Galveston, H. & S. A. R. Co., 5 Tex. Civ. App. 644; Mercur Gold Mining, etc. Co. v. Spry, 16 Utah 222; Dean v. Madison, 9 Wis. 402; Weeks v. Milwaukee, 10 Wis. 242; Jenkins v. Rock County, 15 Wis. 11; Mitchell v. Milwaukee, 18 Wis. 92; Crane v. Janesville, 20 Wis. 305; Grimmer v. Sumner, 21 Wis. 179; Hamilton v. Fond du Lac, 25 Wis. 490; Siegel v. Outagamie County, 26 Wis. 70; Judd v. Fox Lake, 28 Wis. 583; Shepardson v. Milwaukee, 28 Wis. 593; Wals v. Grosvenor, 31 Wis. 681. See Galveston Gas Co. v. Galveston County, 54 Tex. 287, 291. That the tax might have been collected from personalty has been held to be no answer to a bill to remove a cloud from the title to real estate: Scofield v. Lansing, 17 Mich. 437. In Indiana it has been held that as a tax-sale of land where there is personalty transfers the state's

lien, so that it is not absolutely void, an injunction to restrain the making of a deed will not be granted: St. Clair v. McClure, 111 Ind. 467. See Foresman v. Chase, 68 Ind. 500. *Contra*, Johnson v. Hahn, 4 Neb. 139. The cloud upon the title is presumptively removed when personalty sufficient to satisfy the tax is levied upon: Henry v. Gregory, 29 Mich. 68. Sale of the land may be enjoined on a showing that there is sufficient personalty subject to levy: Johnson v. Hahn, 4 Neb. 139. A federal court will enjoin a sale of the real estate of a national bank to enforce payment of taxes illegally assessed against its capital stock, under a law which would make the sale a cloud on its title, though the state statute gives an action at law to recover back taxes illegally exacted: Brown v. French, 80 Fed. Rep. 166. Under the New York statute providing that no suit shall be commenced for the vacation of any assessment or to remove a cloud upon title, and prescribing remedies in such cases, the collection of an illegal assessment will not be enjoined on the ground that the suit is to prevent the creation of a cloud on plaintiff's title, since such a suit is, in effect, one to vacate the assessment: Scudder v. New York, 146 N. Y. 245. But a statute forbidding the vacating an assessment on account of certain specified irregularities and omissions "except only in the cases in which fraud shall be shown," does not affect a case in which there had

in this rule of law, and a bill in equity would not lie on his behalf to remove the lien of the tax, or to set aside the deed after a sale.¹ And in Connecticut it is held that although a proceeding may cast a cloud upon title, yet if the evidence to rebut the *prima facie* case is of record, easily attainable and not likely to be lost, so that ultimately the owner would be sure to vindicate his title, the court of equity might in its discretion refuse an injunction.² On the other hand, there are many cases which ignore the distinction between proceedings void on their face for illegality, and proceedings which, though illegal in fact, are on their face presumptively valid, and which, if they do not give relief on the ground of illegality alone, will give it on the ground that any sale of the land under proceedings which assume to be by authority of law, and are conducted by public officers empowered to make such sales, is such a cloud upon the title of the owner as he ought, in equity, to be relieved against, if the officers are proceeding unlawfully, and have no authority in fact.³ There is much to be said in favor

been no advertisement and no competition: *In re Rosenbaum*, 119 N. Y. 24. So, a charter provision that the only remedy for grievance because of an assessment shall be appeal from the assessment of benefits, does not preclude the property owner from attacking a sale based on such assessment on the ground that the assessment was illegal and void, where the only relief authorized on appeal is that the difference between benefits assessed and benefits received shall be paid by the city: *Hayes v. Douglas County*, 92 Wis. 429.

¹ *Guest v. Brooklyn*, 79 N. Y. 624, citing *Sharp v. Speir*, 4 Hill 76; *Adams v. Washington & S. R. Co.*, 10 N. Y. 328; *Hilton v. Bender*, 69 N. Y. 75, and *Merritt v. Portchester*, 71 N. Y. 309. See, also, *Minturn v. Smith*, 3 Sawy. 142.

² *Waterbury Savings Bank v. Lawler*, 46 Conn. 243.

³ *Pugh v. Youngblood*, 69 Ala. 296; *Ottawa v. Walker*, 21 Ill. 605, and cases cited; *Chicago, etc. R. Co. v. Frary*, 22 Ill. 34; *Barnard v. Hoyt*, 63 Ill. 341; *Litchfield v. Polk County*, 18 Iowa 70; *Holland v. Baltimore*, 11 Md. 186; *Baltimore v. Porter*, 18 Md. 284; *Leslie v. St. Louis*, 47 Mo. 474; *Burnett v. Cincinnati*, 3 Ohio 73; *Culbertson v. Cincinnati*, 16 Ohio 574. It was held in *Beaser v. Ashland*, 89 Wis. 28, that a complaint to cancel a special assessment, and to restrain the enforcement of it is not demurrable because the assessment is void. In Nebraska, if a tax or assessment is absolutely void in itself, so as to be no tax, but a mere pretense under color whereof rights are affected and titles clouded, an action to quiet title and remove the cloud is maintainable: *Touzalín v. Omaha*, 25 Neb. 817; *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369.

of the rule adopted in these cases, which is certainly a convenient rule, and enables a party whose title is threatened, however feebly, to settle all questions concerning it once for all, and thus put an end to any annoyance or prejudice that might in any contingency otherwise result.¹

A bill to set aside a tax or a tax-sale as a cloud upon title may be filed any time after the tax is laid,² and mere delay in proceeding against a void tax or special assessment will not of itself constitute laches;³ but statutory limitations must be observed.⁴ The occupant of lands, even though he is not the owner, may be complainant;⁵ so may an owner of the reversion in trust;⁶ or a *cestui que trust* who is equitable owner.⁷ A firm cannot enjoin the sale of the individual property of one of the members for a tax against the firm, but the owner himself must sue.⁸ A subsequent purchaser of property against which a special assessment has been laid may sue to establish the invalidity of such assessment.⁹ Where a tenant by the

See *Chicago, B. & Q. R. Co. v. Nemaha County*, 50 Neb. 393; *Ives v. Irey*, 51 Neb. 136. But such an action, directed against an apparent lien by way of tax or special assessment, is maintainable only in case such tax or assessment itself is absolutely void: *Philadelphia Mortg. & T. Co. v. Omaha (Neb.)*, 90 N. W. Rep. 1004.

¹ Making of a deed on a tax-sale may be enjoined: *Worthen v. Badgett*, 32 Ark. 496; *Kittle v. Bellegarde*, 86 Cal. 556.

² *Roe v. Lincoln County*, 56 Wis. 66, citing *Mitchell v. Milwaukee*, 18 Wis. 92. And see *Peck v. School Dist.*, 21 Wis. 516.

³ *Casey v. Burt County*, 59 Neb. 624; *Batty v. Hastings (Neb.)*, 88 N. W. Rep. 139. After an assessment has been levied for seven years, it is too late to question the validity by suit to enjoin a threatened sale thereunder, though the sale is under a new process; the

process being made necessary by the restraint, at complainant's suit, of the sale attempted more than seven years before, and being but a continuation of what was then begun: *Ross v. Portland*, 105 Fed. Rep. 682.

⁴ See, on the subject of statutory limitations of suits to remove cloud from the title, *Morris v. St. Louis Nat. Bank*, 17 Colo. 231; *Smith v. Smith*, 150 Mass. 73; *London & N. W. Mortg. Co. v. Gibson*, 77 Minn. 394; *Morrow v. Lander*, 77 Wis. 77; *Chicago, St. P., M. & O. R. Co. v. Bayfield County*, 87 Wis. 188; *Pratt v. Milwaukee*, 93 Wis. 658; *Levy v. Wilcox*, 96 Wis. 127.

⁵ *Barnard v. Hoyt*, 63 Ill. 341.

⁶ *Steuart v. Meyer*, 54 Md. 454.

⁷ *Flint & P. M. R. Co. v. Auditor-General*, 41 Mich. 635.

⁸ *Lyle v. Jacques*, 101 Ill. 644.

⁹ *Batty v. Hastings (Neb.)*, 88 N. W. Rep. 139. One to whom

curtesy seeks relief from an illegal assessment the remainderman is not a proper party.¹ A mortgagee may sue to set aside an illegal tax-sale of part of the mortgaged land, even though the mortgage debt could be collected by selling the rest of the mortgaged land, and by suing the mortgager.² A mortgager who has covenanted to pay all taxes to be levied on the mortgaged premises may, after foreclosure and sale, maintain an action to set aside an illegal tax.³ Where land has been sold for non-payment of taxes, and purchased by the state, the former owner has only the right of redemption, and until redemption by him, or by some one in his interest, he cannot maintain a suit to remove a cloud from his title.⁴ In Louisiana it has been held that a purchaser from the state of a void tax-title may be proceeded against to set it aside without making the state a party;⁵ while in Michigan the auditor-general though a proper is not a necessary party to a bill to set aside an invalid tax-sale.⁶ If a bill is filed with reference to the taxes of a single year, it has been held that relief will not be

land is conveyed after a city improvement has been begun, but before an assessment, cannot be said, as matter of law, not to be a "party aggrieved" by the assessment, the conveyance being subject thereto: *In re Pennie*, 108 N. Y. 364.

¹ *White v. Portland*, 67 Conn. 273.

² *Miller v. Cook*, 135 Ill. 190. As to sufficient showing, by alleged mortgagee, of interest in the land so as to enable him to maintain bill, see *Johnson v. Petit*, 64 Iowa 162.

³ *Spear v. Door County*, 65 Wis. 298.

⁴ *Mathews v. Glenn* (Va.), 41 S. E. Rep. 735, citing *Parsons v. Newman*, 99 Va. 298; *Glenn v. Brown*, 99 Va. 322. That the county treasurer intends to expose prematurely for sale land purchased by the county at a tax-sale does not

entitle the owner of the equity of redemption to an injunction: *Cobban v. Hinds*, 23 Mont. 338.

⁵ *Denegre v. Gerac*, 35 La. An. 952; *Budd v. Houston*, 36 La. An. 959.

⁶ *Greenley v. Hovey*, 115 Mich. 504. Both the auditor-general and the sheriff are proper parties to a suit to set aside a tax as illegal and void, for the former institutes the proceedings for sale, and the latter makes the sale: *Lake Superior Ship Canal, etc. Co. v. School Dist.*, 79 Mich. 351. The auditor-general is not a necessary party to a bill to set aside as illegal a township highway tax: *Thomas v. Auditor-General*, 120 Mich. 535. Parties defendant under the Wisconsin statute: *Gilman v. Sheboygan County*, 79 Wis. 26. As to amending the bill to add a formal party, see *Folkerts v. Power*, 42 Mich. 283.

given as to the taxes of other years under the prayer for general relief.¹

In vacating a tax or a sale for taxes as a cloud upon title it is proper to require the complainant to pay any sum that is either a legal or an equitable charge against him, and which will be affected by the decree.² And this will be required although an action against him for such sum would be barred by the statute of limitations.³ If the tax were wholly illegal in its essentials, of course no such requirement could be made, for it would not be supported by any equity.⁴

¹ *Beach v. Schoenmaker*, 18 Kan. 174. As to the allegations in the bill, see *Wells County v. Gruver*, 115 Ind. 224; *Wells County v. Mounsey*, 115 Ind. 598, 599; *Jenks v. Hatheway*, 48 Mich. 536; *Ward v. Board of Com'rs*, 12 Mont. 23; *Anderson v. Douglas County*, 98 Wis. 393.

² See *Smith v. Gage*, 12 Fed. Rep. 32; *Rice v. Jerome*, 97 Fed. Rep. 719; *Charlton v. Kelly*, 24 Colo. 273; *Kissimmee City v. Cannon*, 26 Fla. 3; *Phelps v. Harding*, 87 Ill. 442; *Farwell v. Harding*, 96 Ill. 32; *Peacock v. Carnes*, 110 Ill. 99; *Gage v. Nichols*, 112 Ill. 269; *Alexander v. Merrick*, 121 Ill. 606; *Gage v. Pirtle*, 124 Ill. 502; *Miller v. Cook*, 135 Ill. 190; *Peoria & P. U. R. Co. v. People*, 183 Ill. 19; *Harrison v. Haas*, 25 Ind. 281; *McWhinney v. Brinkler*, 64 Ind. 360; *Peckham v. Millikan*, 99 Ind. 352; *Rowe v. Peabody*, 102 Ind. 198; *Miller v. Madden*, 35 Kan. 455; *Hansen v. Mauberret*, 52 La. An. 1565; *Steuart v. Meyer*, 54 Md. 454; *Jenkinson v. Auditor-General*, 104 Mich. 34; *Hamilton, etc. Co. v. L'Anse T'p*, 107 Mich. 419; *Connecticut Mut. L. Ins. Co. v. Wood*, 115 Mich. 444; *Lewis Co. v. Knowlton*, 84 Minn. 53; *McClain v. Batton*, 50 W. Va. 121. Where an assessment for the expense of a local

improvement is objected to for irregularities, the court, as a condition of relief, may require the owner to do equity by paying the amount by which his property has been benefited: *Darst v. Griffin*, 31 Neb. 668. See *Pittsburgh's Appeal*, 118 Pa. St. 458. As to the necessity and sufficiency of tender of taxes justly due, see *Whitehead v. Farmers' L. & T. Co.*, 98 Fed. Rep. 10, 39 C. C. A. 34; *Gage v. Arndt*, 121 Ill. 491; *Sankey v. Seipp*, 27 Ill. App. 299; *Nicodemus v. Young*, 90 Iowa 423; *Miller v. Madden*, 35 Kan. 455; *Prescott v. Payne*, 44 La. An. 650; *State v. Cannon*, 44 La. An. 734; *Lefebvre v. Negrotto*, 44 La. An. 792; *Fowler v. Campbell*, 100 Mich. 398; *Denman v. Steinbach* (Wash.), 69 Pac. Rep. 751; *McClain v. Batton*, 50 W. Va. 121; *Meggett v. Eau Claire*, 81 Wis. 326; *Yates v. Milwaukee*, 92 Wis. 352; *Wells v. Western Paving Co.*, 96 Wis. 116. When necessary to bring money into court: *Lancaster v. Du Hadway*, 97 Ind. 565; *Morrison v. Jacoby*, 114 Ind. 84; *Logansport v. Case*, 124 Ind. 254; *Montgomery v. Trumbo*, 126 Ind. 331.

³ *Barke v. Early*, 72 Iowa 273. See *Harber v. Sexton*, 66 Iowa 211; *Wygant v. Dahl*, 26 Neb. 562.

⁴ *Bode v. New England Inv. Co.*,

Quieting title after a sale. If land has been actually sold and conveyed for a tax, the original owner remaining in possession may have the validity of the sale tested by a bill in equity, filed for the purpose of quieting his title. The suit is analogous to a suit to remove a cloud from the title and is governed by the same principles. Courts of law cannot give the party relief in such a case, as he cannot bring ejectment, being himself in possession; and no other form of action is provided by the common law for such a case. And where the officers have proceeded to sale and conveyance, even though the defects in the title are apparent of record, and the deed is not *prima facie* evidence of title, it may perhaps be possible to distinguish the case from one in which the void proceedings are only impending. While they are in progress, it may be assumed that the officers will pause in their illegal action before any sale is reached; but when sale is actually made, and a conveyance has been given, which, though void, may affect the market value of the land, there would seem to be no very conclusive reason why equity should not interfere and decree a cancelment of the void claim.¹ If the tax-purchaser has entered

6 Dak. 499; *Yocum v. First Nat. Bank*, 144 Ind. 272, citing *Hobbs v. Tipton County*, 103 Ind. 575; *Guidry v. Broussard*, 32 La. An. 924. Where a partner's land was sold for a partnership assessment which was wholly void, it was held there need be no tender of the sum paid by the purchaser: *Wilmerton v. Phillips*, 103 Ill. 78. Where, in a bill to restrain the issue of a tax-deed, it is alleged that the assessment was invalid for fraud, there need be no tender or allegation of willingness to pay a re-assessment: *Anderson v. Douglas County*, 98 Wis. 393. An abutting property owner may, without tendering the amount of the benefits, invoke the aid of equity against the consequences of an assessment for street improvements which were made under void proceedings, where he protested against

the improvements in their inception: *Ladd v. Spencer*, 23 Or. 193. A mortgagee seeking to remove from the title of the mortgaged property a cloud produced by irregular and collusive tax-sales is not bound to make a tender of the purchase-money: *Beltram v. Villere (La.)*, 4 South. Rep. 506.

¹ See *Bardon v. Land, etc. Imp. Co.*, 157 U. S. 327; *Rich v. Braxton*, 158 U. S. 375; *Head v. Fordyce*, 17 Cal. 149; *Hartford v. Chipman*, 21 Conn. 488; *Keokuk, etc. Co. v. People*, 185 Ill. 276; *Burton Stock-Car Co. v. Traeger*, 187 Ill. 9; *Brownell v. Storm Lake Bank*, 63 Iowa 754; *Holland v. Baltimore*, 11 Md. 186; *Polk v. Rose*, 25 Md. 153; *Fonda v. Sage*, 48 N. Y. 173; *Almony v. Hicks*, 3 Head 39; *Yancey v. Hopkins*, 1 Munf. 419; *Thomas v. Jones*, 98 Va. 323; *Pulford v. Whicher*, 76

into possession of the land, the original owner has an adequate remedy by suit at law in ejectment; and to this he must resort.¹ When neither party has actual possession, if the statute has authorized the action of ejectment to be brought on the con-

Wis. 555. A suit to set aside a tax as illegal and void is maintainable although the Michigan tax-law provides for a proceeding in which the land-owner may contest the validity of the tax, such law not in terms repealing or in any way amending the statute authorizing suits to quiet title: *Lake Superior S. C. R. I. Co. v. Auditor-General*, 79 Mich. 351. In New Jersey chancery has jurisdiction of a bill to quiet title to land on which defendant claims a lien under a sale for taxes, as to which lien complainant has a right of redemption: *Devine v. Franks* (N. J. Eq.), 47 Atl. Rep. 228. One who has executed a bond for a deed and surrendered possession of the land to the obligee may still maintain a bill to set aside a tax-deed, since the legal title remains in him: *Langlois v. Stewart*, 156 Ill. 609. Chancery has jurisdiction of a suit to annul a tax-sale and conveyance to a third person, though the complainant is not in the actual possession of the land conveyed thereby: *Bogges v. Scott*, 48 W. Va. 310. Possession of the premises acquired by the holder of a tax-deed through an arrangement with a tenant of the original owner warrants a bill to quiet title: *Lillie v. Snow*, 118 Mich. 611. In Mississippi an owner out of possession may file a bill to have set aside as a cloud on title a tax-title held by a party in possession, though the court of chancery cannot award possession: *Wofford v. Bailey*, 57 Miss. 239. The same rule prevails in Indiana; and if

the party out of possession succeeds in his suit, the decree will be evidence in his favor in a suit to recover possession: *Farrar v. Clark*, 97 Miss. 447. In the same state the holder of the tax-title may file a bill to quiet his title or have the lien of the tax established if the title proves defective: *Locke v. Cattell*, 96 Ind. 291. A bill to quiet title as against tax-claims by the state will not lie without a statute providing for it: *Burrill v. Auditor-General*, 46 Mich. 256. Questions of laches and the statute of limitations: *Kraus v. Montgomery*, 114 Ind. 103; *Burke v. Cutler*, 78 Iowa 299; *Wisconsin Central R. Co. v. Lincoln County*, 67 Wis. 478.

¹ The court of chancery is not the proper tribunal for settling titles to land generally: *Munson v. Munson*, 28 Conn. 582; *Thayer v. Smith*, 9 Met. 469; *Devaux v. Detroit*, Har. Ch. 98; *Blackwood v. Van Vleet*, 11 Mich. 252; *Sanderlin v. Thompson*, 2 Dev. Ch. 539. It is not competent to give relief in equity against the party in actual possession; he having a constitutional right to a trial by jury: *Tabor v. Cook*, 15 Mich. 322. See *Springer v. Rosette*, 47 Ill. 223; *Locke v. Cattell*, 96 Ind. 291. In South Carolina a grantee of the state, in possession of land rightfully sold for taxes, must answer to the rightful owner thereof in a suit to vacate the deed brought within two years from the date of the tax-deed: *Pool v. Evans*, 57 S. C. 78.

structive possession, which either may claim by virtue of the conveyances which he holds, the suit at law would appear to be the adequate remedy in such a case also.¹ As in removing cloud from title, he who seeks relief against a tax-deed must pay or offer to pay whatever taxes, interest, costs, etc., are justly chargeable against the land, and payment will be required by the decree;² otherwise, where the taxes were absolutely void.³

¹ *Bonnell v. Roane*, 20 Ark. 114; *Scott v. Watkins*, 22 Ark. 556; *Parish v. Eager*, 15 Wis. 532. In Kentucky it has been held that although neither party is in possession of land sold for taxes, a bill to cancel the auditor's deed to the purchaser, and the purchaser's deed to the defendant, may be maintained by the owner: *National Bank v. Licking Valley, etc. Co. (Ky.)*, 22 S. W. Rep. 881.

² See *Gage v. Waterman*, 121 Ill. 115; *Gage v. Caraher*, 125 Ill. 447; *Smith v. Prall*, 133 Ill. 308; *Gage v. Dupuy*, 134 Ill. 132; *Gage v. Nichols*, 135 Ill. 128; *Glos v. O'Brien Lumber Co.*, 183 Ill. 211; *Cotes v. Rohrbeck*, 139 Ill. 532; *Montgomery v. Trumbo*, 126 Ind. 831; *Willard v. Ames*, 130 Ind. 851; *Browning v. Smith*, 139 Ind. 280; *Taylor v. Ormsby*, 66 Iowa 109; *Gardner v. Early*, 69 Iowa 42; *Barke v. Early*, 72 Iowa 273; *Guisse v. Early*, 72 Iowa 283; *Buckley v. Early*, 72 Iowa 289; *Snell v. Dubuque & S. C. R. Co.*, 88 Iowa 442; *Cone v. Wood*, 108 Iowa 260; *Wilson v. Reasoner*, 37 Kan. 663; *Ragsdale v. Alabama G. S. R. Co.*, 67 Miss. 106; *Casey v. Wright*, 14 Mont. 315; *Dillon v. Merriam*, 22 Neb. 151; *Browne v. Finlay*, 51 Neb. 465; *O'Neil v. Tyler*, 3 N. D. 47; *Brentano v. Brentano (Or.)*, 67 Pac. Rep. 922; *Clark v. Darlington*, 11 S. D. 418; *Strother v. Reilly*, 105 Tenn. 48; *McClain v.*

Batton, 50 W. Va. 121; *Hayes v. Douglas County*, 92 Wis. 429; *Blackman v. Arnold (Wis.)*, 89 N. W. Rep. 513. Owners who had paid taxes not required, as condition to having tax-deeds set aside, to refund taxes paid, where holders of such deeds paid under different descriptions: *Maher v. Brown*, 183 Ill. 575. Reimbursement required without regard to statute of limitations: *Harbor v. Sexton*, 66 Iowa 211; *Wygant v. Dahl*, 26 Neb. 562. Reimbursement refused before suit, not made condition of relief: *Perham v. Haverhill Fibre Co.*, 64 N. H. 485. On setting aside of tax-deed complainant not required to pay tax prior to taxes for which sale was made: *Lauer v. Weber*, 177 Ill. 115. Decree requiring repayment as condition to relief held not erroneous for not fixing definite period within which payment must be made: *Glos v. Brown*, 194 Ill. 307. Plaintiff held not entitled to impeach validity of tax by showing that proceedings annexing the land to the town which levied the tax were illegal: *Scarry v. Lewis*, 133 Ind. 96.

³ *Powers v. Larabee*, 2 N. D. 141; *Eaton v. Bennett (N. D.)*, 87 N. W. Rep. 188; *Title Trust Co. v. Aylsworth (Or.)*, 66 Pac. Rep. 276. One whose land has been sold for taxes the legality of which is in good faith controverted may sue

Fraud. A tax founded on a fraudulent assessment will be enjoined.¹ An assessment is not fraudulent merely because of being excessive, if the assessors have not acted from improper motive;² but if it is purposely made too high through preju-

to have his title quieted without offering to pay his just share of the public burdens: *O'Neil v. Tyler*, 3 N. D. 47.

¹ Assessors have not an unlimited discretion in levying taxes; fraudulent action on their part may be corrected in equity, and there may possibly be other remedy for fraudulent valuation: *Bath v. Whitmore*, 79 Me. 182. An injunction to restrain the collection of a tax alleged to have been fraudulently assessed will not be refused by a federal court on the ground that a proceeding by *certiorari* is pending in the state court, since the motives which may have actuated the assessor in making the assessment are not open to review in the *certiorari* proceeding: *Hazzard v. O'Bannon*, 36 Fed. Rep. 854. The remedy by appeal to the circuit court is not exclusive where the assessment is arbitrary and fraudulent: *Kersten v. Milwaukee*, 106 Wis. 200. Where fraud is not charged against the board of review an assessment confirmed by it after appearance and complaint will not be set aside on the ground that the assessors' valuation was excessive and fraudulent, and for omissions of statutory requirements; the board's action is final and conclusive, and purges the original assessment of fraud and mistake: *Burton Stock-Car Co. v. Traeger*, 187 Ill. 9, citing *Spring Valley Coal Co. v. People*, 157 Ill. 543, and *New Haven Clock Co. v. Kochersperger*, 175 Ill. 383. As to the time within which an action must be brought

to enjoin the collection of a paving assessment on the ground that members of the city council had a pecuniary interest in the contract, see *Topeka v. Gage*, 44 Kan. 87.

² *Maish v. Arizona*, 164 U. S. 599; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *Chicago Grain, etc. Exchange v. Gleason*, 121 Ill. 502; *Phoenix Grain, etc. Exchange v. Gleason*, 121 Ill. 524; *Hamilton v. Rosenblatt*, 8 Mo. App. 237; *Smith v. Kelly*, 24 Or. 464; *Edison Electric Illum. Co. v. Spokane County*, 22 Wash. 168. Even though irregularly made: *Gage v. Evans*, 90 Ill. 569. "Whether or not there has been fraud in the excessive valuation of property for taxation is a question which will depend largely upon the circumstances of each particular case in which the valuation is made. The excessive valuation by itself does not establish fraud, but the attending circumstances may be looked into in order to determine whether or not the valuation was excessive." *Burton Stock-Car Co. v. Traeger*, 187 Ill. 9, citing cases. Equity will not enjoin an assessment of property at its full value, on the ground of inequality resulting from the assessment of other property at less than its full value, unless it appears that the assessing officers, whose acts of undervaluation create the unjust burden, intentionally and habitually violate the law by assessing property at less than its true value; but it need not conclusively appear that they did so with intent to injure com-

dice or a reckless disregard of duty in opposition to what must necessarily be the judgment of all competent persons,¹ or through the adoption of a rule which is designed to operate unequally upon a class and to violate the constitutional rule of uniformity,² the case is a plain one for the equitable remedy by injunction. So is any case in which a tax is rendered unequal or unfair by fraudulent or reckless conduct of officers,³ or in which the party is deprived by like practices of important rights which the law intends to secure to him; such, for instance, as the right of appeal from an assessment, or to be heard by the board of review before his assessment should be raised.⁴ But mere irregularities in the proceedings of tax offi-

plainant and his class of taxpayers: *Taylor v. Louisville & N. R. Co.*, 88 Fed. Rep. 350, 31 C. C. A. 537.

¹ *Wright v. Railroad Co.*, 64 Ga. 783; *Pacific Postal Tel. Co. v. Dalton*, 119 Cal. 604; *Republic L. Ins. Co. v. Pollak*, 75 Ill. 292; *Chicago, etc. R. Co. v. Cole*, 75 Ill. 591; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *New Haven Clock Co. v. Kochersperger*, 175 Ill. 383; *Merrill v. Humphrey*, 24 Mich. 170; *Albany, etc. R. Co. v. Canaan*, 16 Barb. 244; *Webb v. Renfrew*, 7 Okl. 198; *Knapp v. King County*, 17 Wash. 567; *Gove v. Tacoma (Wash.)*, 67 Pac. Rep. 261, and cases cited; *Lepperts v. Calumet Supervisors*, 21 Wis. 688; *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51. See *Los Angeles County v. Ballerino*, 99 Cal. 593.

² *Cummings v. National Bank*, 101 U. S. 153; *Pelton v. National Bank*, 101 U. S. 143; *Dundee Mortg. T. Inv. Co. v. Parrish*, 24 Fed. Rep. 197; *Chicago, B. & Q. R. Co. v. Board of Com'rs*, 67 Fed. Rep. 411, 14 C. C. A. 456, 32 U. S. App. 227; *Chicago, B. & Q. R. Co. v. Board of Com'rs*, 54 Kan. 781.

³ *Hamblin Real Estate Co. v.*

Astoria, 26 Or. 599; *Semple v. Langlade County*, 75 Wis. 354. Fraudulent undervaluation; owner of other property relieved proportionately: *Walsh v. King*, 74 Mich. 350. Only so much as appears to be unreasonable should be enjoined: *Trustees v. Guenther*, 19 Fed. Rep. 395; *Merrill v. Humphrey*, 24 Mich. 170; *Chattanooga v. Railroad Co.*, 7 Lea 561. Where the tax-roll, because of intentional omissions of property, was so fraudulent that it afforded no basis for the court to estimate the excessive portions of the tax, a decree holding the entire tax-roll void was proper: *Auditor-General v. Pioneer Iron Co.*, 123 Mich. 521. If, in spite of valid legislation compromising the tax with the taxpayer, the officer attempts to proceed to sale, he will be enjoined: *Tallahassee Manuf. Co. v. Glenn*, 50 Ala. 489. If a municipality sells lands representing that there are no taxes against them, it will be enjoined from enforcing back taxes: *Calhoun County v. American Em. Co.*, 93 U. S. 124.

⁴ See *Cleghorn v. Postlewaite*, 43 Ill. 428; *Darling v. Gunn*, 50

cers do not make out fraud, or even give evidence of it.¹ And fraud must be alleged and proved: all presumptions are against it.² It has been held that a suit to set aside a tax-sale for fraud may be maintained by an owner out of possession of the land, it not being a suit to quiet title.³

Bills of interpleader. It is possible for cases to arise in which the same sum of money is demanded as a tax under conflicting claims, by different officers — or, in city cases under peculiar ordinances, by a contractor and an officer. Conflicting claims may also arise where one is taxed as representing another, in the capacity of agent, trustee, or otherwise, or as an officer of a corporation representing the shareholders, and where the person beneficially interested contests the tax. Such cases may possibly justify a bill of interpleader as the most ready method of determining to whom the custodian of the fund is under obligation to make payment.⁴ It has been held that a bill of interpleader will not lie at the suit of an executor to compel two towns to determine in which he is taxable. His remedy is at law after payment to one of the towns.⁵

Ill. 424; *Dempster v. Chicago*, 175 Ill. 278; *Citizens' Nat. Bank v. Columbia County*, 23 Wash. 441.

¹ *Perley v. Dolloff*, 60 N. H. 504; *Wagoner v. Loomis*, 37 Ohio St. 571. It is immaterial that the assessor failed to keep his promise to visit the complainant's office to hear suggestions in regard to the property before making the assessment: *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535.

² *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *Union Trust Co. v. Weber*, 96 Ill. 346. As to sufficiency of allegations, see *Sterling Gas Co. v. Higby*, 134 Ill. 557; *Delphi v. Bowen*, 61 Ind. 29; *Florer v. Sherwood*, 128 Ind. 495; *Bardrick v. Dillon*, 7 Okl. 535; *Lee v. Mehew*, 8 Okl. 136; *Oregon & C. R. Co. v. Jackson County*, 38 Or. 589; *South-*

ern Oregon Co. v. Coos County, 39 Or. 185. Evidence held insufficient to establish fraud in making an assessment: *Clement v. People*, 177 Ill. 144. Failure to collect taxes no proof of fraud: *Mitchell v. Craven County*, 74 N. C. 487. It was held in *Auditor-General v. Pioneer Iron Co.*, 123 Mich. 521, that where a tax-roll was proved to have been fraudulently made up it was not necessary for persons resisting the sale of lands for taxes levied thereunder to furnish the court with data for the proper estimation of their taxes.

³ *Herr v. Martin*, 90 Ky. 377.

⁴ See *Thomson v. Ebbets*, Hopk. Ch. 272; *Mohawk & H. R. Co. v. Clute*, 4 Paige 384.

⁵ *Macy v. Nantucket*, 121 Mass. 351.

Statutory methods of attack. In some states provisions have been made by statute for attacking and annulling assessments, for setting aside tax-sales, and for withholding or vacating tax-deeds. Thus, in Florida a petition may, under the statute, be filed to have an assessment for taxes declared illegal and void;¹ in Minnesota a statutory action lies to test the validity of a forfeiture of land for non-payment of taxes;² in New York it is provided that the comptroller shall cancel a sale for taxes and shall refund the purchase-money if he shall discover that such sale was invalid;³ and the tax-law of Michigan con-

¹ The petition is demurrable unless it shows that the illegality existed at the time it was filed: *Pensacola v. Bell*, 22 Fla. 466. Where the legal items can be separated from the assessment list without impairing those which are legal, the entire assessment should not be declared to have been unlawfully made: *Tampa v. Mugge*, 40 Fla. 326, citing *Pensacola v. Louisville & N. R. Co.*, 21 Fla. 492.

² To sustain this action it is not necessary that plaintiff bring himself within what are called "the acknowledged heads of equity." The right of action given is a right to test generally, and without limitations: *Willard v. Redwood County Com'rs*, 22 Minn. 61. Nor is it necessary that the complaint allege that the forfeited land has been purchased from the state: *Ibid.* As the proceeding is purely statutory, it is competent to provide that the complainant shall pay the costs; such a provision is not repugnant to that clause of the bill of rights which declares that "every person ought to obtain justice freely and without purchase:" *Ibid.*

³ This power, it has been held, is for the purchaser's benefit, and

it cannot be invoked by the owner of the lands sold, nor can such owner have the decision setting the sale aside reviewed: *People v. Chapin*, 104 N. Y. 369; *Ostrander v. Darling*, 127 N. Y. 70; *People v. Wemple*, 139 N. Y. 240; *People v. Roberts*, 144 N. Y. 234, 151 N. Y. 540. The statute is not confined to cases where the invalidity results from some defect in the comptroller's proceedings in respect to the sale, or to those cases where the comptroller discovers the defect by his own unaided researches and without suggestion or evidence from any one else: *People v. Chapin*, 105 N. Y. 309. The comptroller acts judicially in deciding upon the application, and his judgment declaring the sale invalid cannot be attacked collaterally in proceedings for a *mandamus* to compel the land office commissioners to direct the repayment of the purchase-money required by the statute: *In re Harris*, 90 Hun 245, 36 N. Y. Supp. 29. Where some of the taxes for which lands are sold are valid, the cancellation of the sales does not cancel such taxes, and it is proper for the comptroller to carry them forward on his books for col-

tains provisions by which sales may be set aside upon application to the court in cases where the taxes were paid, or where the property was exempt from taxation,¹ and it also authorizes the auditor-general, in like cases, to withhold a conveyance,² or, if a conveyance has been executed, to give a certificate of error.³ In Michigan the statute also directs that in case of the sale for delinquent taxes of lands belonging to any infant, the court may order such sale stayed or canceled if it appears to

lection on future sales of the lands: *People v. Wemple*, 53 Hun 197, 6 N. Y. Supp. 732.

¹ See, for the grounds upon which a petition or a bill of review will lie in Michigan to set aside a tax-sale that has been confirmed: *Berkey v. Burchard*, 119 Mich. 101; *Brooks v. Auditor-General*, 119 Mich. 329; *Burns v. Ford*, 124 Mich. 274. Petition dismissed for laches: *Cook v. Hall*, 123 Mich. 378. Where the tax-sale purchaser has applied for a writ of assistance to the court in which the proceedings leading to decree and sale were had, the original owner, upon a counter-petition and notice to the auditor-general and the purchaser, may seek to have the sale and deed set aside because of defects in said proceedings. The purchaser being already before the court, an independent bill to bring him in is unnecessary: *Jenkinson v. Auditor-General*, 104 Mich. 34. A decree setting aside sale and deed should require the original owner to refund to the purchaser the amount paid by the latter, with interest: *Ibid.*

² As to when the auditor-general is warranted in withholding a tax-deed, see *Hand v. Auditor-General*, 112 Mich. 597; *Kneeland v. Auditor-General*, 113 Mich. 63. The statute fixes no limit of time

within which the auditor-general may act in withholding or canceling a deed: *Kneeland v. Wood*, 117 Mich. 174. As there is no provision prescribing how the fact of payment shall be made to appear, the auditor-general may satisfy himself of the fact of payment (or of an attempt to pay rendered unavailing through the officer's fault) by any competent proof, subject to review by the courts in a proper proceeding: *Ibid.*

³ This provision in regard to the auditor-general's furnishing a certificate of error does not contravene the section of the constitution which vests the judicial power in the courts; for under it the auditor acts ministerially rather than judicially: *Northrup v. Maneka*, 126 Mich. 550. It should be construed liberally to the end that a taxpayer justly entitled to relief may not be cut off from all remedy: *Kneeland v. Wood*, 117 Mich. 174. It does not authorize the auditor-general to cancel a tax-deed upon his own motion, but only upon the application of an interested party; and it does not apply to tax-deeds which have been issued to the state under the homestead provisions of the tax-law: *State Land Office Com'r v. Auditor-General (Mich.)*, 91 N. W. Rep. 153. In

be necessary to protect his rights.¹ Irrespective of statute the rule would be, where land has been sold in pursuance of the judgment or decree of a competent court, after due opportunity given the delinquent taxpayer and others interested to appear and make defense, that the subsequent proceedings should be governed by the rules which apply to ordinary judicial sales;² and, as has been shown, a judicial tax-sale must usually be attacked, if at all, in the tax-suit itself, or in a direct proceeding brought for that purpose.³ Where direct remedies are provided by statute for attacking tax-deeds, they should be pursued, and the original owner cannot be allowed to attack a deed collaterally by showing in ejectment that the tax has been paid, or that his attempt to pay it failed through an officer's fault.⁴

Action against assessors. The wrong which results in injury to the taxpayer is very likely to originate with the as-

Mann v. Carson, 120 Mich. 631, the issue of a writ of assistance to put a tax-purchaser in possession was stayed for ninety days to enable the land-owner to apply to the auditor-general to have the tax-deed canceled. While the auditor-general will be compelled by *mandamus* to issue a certificate of error to which the relator is entitled (Youngs v. Auditor-General, 118 Mich. 550; Hubbard v. Auditor-General, 120 Mich. 505), yet he will not be compelled to grant such a certificate on grounds which are foreclosed by the decree of sale, and which could only be raised in a direct proceeding in the case: Cook v. Auditor-General, 124 Mich. 430. Nor will he be required to issue such a certificate where the title of the grantee in the tax-deed has been settled in a suit involving the regularity of the tax proceedings and the validity of the deed: Hanchett v. Auditor-General, 124 Mich. 424. A certificate of error which shows

affirmatively that it was issued upon a supposed error or defect which as a matter of law was clearly not such, should in any proceeding be treated as void: Vetterly v. McNeal (Mich.), 89 N. W. Rep. 441. A certificate purporting to set aside a tax-deed for the taxes of several years might annul the deed in part only, if the errors did not affect all of the titles covered: Ibid. Where the auditor-general, as authorized by the statute, has issued a certificate of error against a tax-deed, such deed is insufficient to establish title in the purchaser: Nowlen v. Hall (Mich.), 87 N. W. Rep. 222.

¹ Foegan v. Carpenter, 117 Mich. 89. A minor under guardianship, as well as one without a guardian, is within the protection of this statute: Ibid.

² Jones v. Gillis, 45 Cal. 41.

³ See *ante*, p. 898.

⁴ Kneeland v. Wood, 117 Mich. 174.

essor. The action of that officer, when property is taxed by value, determines the proportion which shall be levied on each individual taxpayer; and the taxation is equal or unequal according as the assessor performs his duty well or ill. When wrong results, therefore, it is natural to inquire whether there may not be a remedy therefor against the assessor; and this inquiry must be answered on a consideration of the nature of assessors' duties, and of the reasons, both public and personal, that bear upon the policy and justice of individual responsibility.

It has long been considered of the very highest importance, that when questions, either of law or fact, are referred to the judgment of an officer selected for the purpose of passing upon them, he should be guarded by such rules of protection that in acting he should be under no concern regarding personal consequences, so that the free exercise of an unbiased judgment may be expected from him. To ensure to him the necessary feeling of security, it is necessary that he be altogether exempt from responsibility to such interested parties as may be dissatisfied with his conclusions, and who might be inclined, if the law permitted it, to call him to personal account for his mistakes or faults of judgment, and endeavor to recover from him a compensation for any loss that they may have suffered as a result of his action. The policy and justice of this exemption are so plain and reasonable that the rule meets with universal assent, and is applied in all cases where functions of a judicial nature are exercised. "They who are intrusted to judge ought to be free from vexation, that they may determine without fear; the law requires courage in a judge, and therefore provides security for the support of that courage."¹ "Judges have not been invested with this privilege for their own protection merely; it is calculated for the protection of the people by insuring to them a calm, steady, and impartial administration of justice."² And this principle of protection is not limited in its application to the judges of courts, but ex-

¹ *Barnardiston v. Soane*, 6 How. St. Tr. 1096, per *North*, Ch. J.

² *Taafe v. Downes*, 3 Moore P. C. 36 n. See *Floyd v. Barker*, 12

Rep. 23; *Mostyn v. Fabrigas*, Cowper 161; *Garnett v. Farrand*, 6 B. & C. 611; *Mills v. Collett*, 6 Bing. 78; *Holroyd v. Bean*, 2 B. & Ald.

tends to all officers who have duties to perform which in their nature are judicial, and which are to be performed according to the dictates of their judgment. Instances of this nature are the decisions of highway officers, that a person claiming exemption from a road assessment is not exempt in fact,¹ or that one assessed is in default for not working out the assessment,² or that a road should or should not be laid out on a prescribed one;³ and the rule applies to the appraisement of damages when property is taken under the eminent domain;⁴ to action of inspectors of elections who are to decide questions of fact which determine the qualifications of voters;⁵ of school directors in deciding upon the removal of a teacher;⁶ of corporate authorities in passing upon questions of suspension of members;⁷ of members of a township board in deciding upon the allowance of claims;⁸ and the like. In many of these cases it will be perceived that the officer who is held exempt is one who, in the main, performs ministerial functions only; but this is unimportant, if in the particular case complained of he was exercising a discretionary authority, or one which, by law, was confided to his deliberate judgment.⁹

473; *Pike v. Carter*, 3 Bing. 78; *Dicas v. Lord Brougham*, 6 C. & P. 249; *Lowther v. Earl of Radnor*, 8 East 113; *Basten v. Carew*, 3 B. & C. 652; *Wilkes v. Dinsman*, 7 How. 89; *Bradley v. Fisher*, 13 Wall. 335; *Gregory v. Brooks*, 37 Conn. 365; *Walker v. Hallock*, 32 Md. 239; *Gordon v. Farrar*, 2 Doug. (Mich.) 411; *Wall v. Trumbull*, 16 Mich. 228; *Yates v. Lansing*, 5 Johns. 282, 9 Johns. 395; *Stewart v. Hawley*, 21 Wend. 552; *Weaver v. Devendorf*, 3 Denio 117; *Vail v. Owen*, 19 Barb. 22; *Hill v. Sellick*, 21 Barb. 207; *Hoggatt v. Bigley*, 6 Humph. 236; *Fuller v. Gould*, 20 Vt. 643; *Wilson v. Marsh*, 34 Vt. 352.

¹ *Harrington v. Commissioners*, 2 McCord 400.

² *Freeman v. Cornwall*, 10 Johns. 470.

³ *Sage v. Laurain*, 19 Mich. 137.

⁴ *Van Steenburgh v. Bigelow*, 3 Wend. 42.

⁵ *Gordon v. Farrar*, 2 Doug. (Mich.) 511; *Jenkins v. Waldron*, 11 Johns. 114; *Miller v. Rucker*, 1 Bush 135; *Carter v. Harrison*, 5 Blackf. 138; *Rail v. Potts*, 8 Humph. 225; *Peavey v. Robbins*, 3 Jones L. 339; *Caulfield v. Bullock*, 18 B. Monr. 494; *Elbin v. Wilson*, 33 Md. 135; *Friend v. Hamill*, 34 Md. 298; *Goetchens v. Mathewson*, 5 Lans. 214.

⁶ *Burton v. Fulton*, 49 Pa. St. 151.

⁷ *Harman v. Tappenden*, 1 East 555.

⁸ *Wall v. Trumbull*, 16 Mich. 228.

⁹ *Jenkins v. Waldron*, 11 Johns. 114; *Weaver v. Devendorf*, 3 Denio 117; *Wall v. Trumbull*, 16 Mich. 228. The levy of a tax within the

If the duties of assessors are in their nature judicial, then this principle applies, and they are entitled to rely upon it for their protection. The proper remedy for erroneous decisions on their part will then be seen to be, not a suit at law to hold them to personal responsibility, but some direct proceeding to correct the error, and prevent the injurious consequences likely to flow from it.

"In the imperfection of human nature," it has been said by an eminent judge, "it is better that an individual should occasionally suffer a wrong than that the course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it."¹ But the law does not intend that wrong shall result in any case; it gives remedies which are supposed to be adequate for all wrongs, and we are to see now whether the particular remedy of a personal action at law is given against assessors.

That the duty of these officers calls into action the judicial function is unquestionable. They are called upon to value estates, and they must do so on their best judgment under all the circumstances which go to affect the value. They should do this impartially as between the several persons whose estates they are to value, and for the same reasons as apply in the case of judges of courts, they should fear no one and have motive for favoring no one. If, therefore, it shall be found that one of these officers has made an excessive assessment, he cannot be held personally responsible for the error,² whether it result from an erroneous view of the facts or of the law.³

limits of legislative authority is an act of sound discretion, and cannot render the board ordering it liable to those whose property is taken to satisfy it: *Moore v. School Directors*, 59 Pa. St. 232.

¹ *Lord Tenterden*, Ch. J., in *Garnett v. Ferrand*, 6 B. & C. 611.

² *San José Gas Co. v. January*,

57 Cal. 614; *Walker v. Hallock*, 32 Ind. 239; *Macklot v. Davenport*, 17 Iowa 379; *Muscatine Western R. Co. v. Horton*, 38 Iowa 33; *Lilienthal v. Campbell*, 22 La. An. 600; *Dillingham v. Snow*, 5 Mass. 547; *Wall v. Trumbull*, 16 Mich. 228; *Stewart v. Chase*, 53 Minn. 62; *Edes v. Boardman*, 58 N. H.

³ See *Williams v. Weaver*, 75 N. Y. 30. An assessor held not liable for committing the tax warrant to himself as collector, under an erroneous view of the law: *Lincoln v. Chapin*, 132 Mass. 470.

An assessor held not liable for refusing to assess certain lands to plaintiff, thus compelling him, as a non-taxpayer, to pay tolls for using a bridge: *Meade v. Haines*, 81 Mich. 261.

But even a judge, if he claims immunity, must be careful not to assume a jurisdiction which the law does not confer upon him. If persons assume to be assessors when they are not, they may justly be held responsible as trespassers;¹ and the lawful assessor, if he assumes an authority to decide upon the rights of others in cases which the law has not confided to his judgment, is in general responsible to the same extent as if he possessed no official character whatever. The office protects him only when he keeps within the limits which have been prescribed for his official action; when he exceeds those he lays aside his official character, and must rely for his protection on the same principles behind which citizens in private life must defend themselves. A case in illustration is that of the assessment of a personal tax upon persons who are not resident within the district, and consequently not subject to the jurisdiction of the assessors.² Others are where, in extending the

580; *McDaniel v. Tebbetts*, 60 N. H. 497; *Perley v. Dolloff*, 60 N. H. 504; *Easton v. Calendar*, 11 Wend. 90; *Weaver v. Devendorf*, 3 Denio 117; *Barhyte v. Shepherd*, 35 N. Y. 238; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Williams v. Weaver*, 75 N. Y. 30; *Vail v. Owen*, 19 Barb. 22; *Brown v. Smith*, 24 Barb. 419; *People v. Reddy*, 43 Barb. 539; *Vose v. Willard*, 47 Barb. 329; *Bell v. Pierce*, 48 Barb. 51; *Pentland v. Stewart*, 4 Dev. & Bat. 386; *Steam Navig. Co. v. Wasco County*, 2 Or. 206; *Wilson v. Marsh*, 34 Vt. 352. See *Carpenter v. Dalton*, 58 N. H. 615. Where the statute gives notice and provides an appeal from any assessment by any person aggrieved, so that a taxpayer has ample means for the redress of an unjust or unauthorized assessment, the owner is not entitled, in the absence of a wilful and intentional assessment of property at more than its true value, to recover in an action against the assessor and his bondsmen for raising the

value of the owner's land above that sworn by him pursuant to the statute: *State v. Reed*, 159 Mo. 77. Where the statute provides that the selectmen, in case of a person's wilful refusal to return the list of his taxable property, shall ascertain the value of his property and set down to him four times the amount thereof, their action in so doing is judicial, and they are not liable for errors of judgment, mistakes, or irregularities in the assessment: *Fawcett v. Dole*, 67 N. H. 168.

¹ *Allen v. Archer*, 49 Me. 346. A tax levied without an assessment is of course void: *Shewalter v. Brown*, 35 Miss. 423.

² *Hinman v. Stevens*, 43 Me. 437; *Ware v. Percival*, 61 Me. 391; *Martin v. Mansfield*, 3 Mass. 419; *Agry v. Young*, 11 Mass. 220; *Sumner v. Dorchester*, 4 Pick. 361; *Gage v. Currier*, 4 Pick. 399; *Inglee v. Bosworth*, 5 Pick. 498; *Freeman v. Kenny*, 15 Pick. 44; *Lyman v. Fiske*, 17 Pick. 231; *Mygatt v. Washburn*, 15 N. Y. 316;

tax after the assessment is made, they spread upon the roll a sum never lawfully voted,¹ or a sum in excess of that which by law is to be levied for the year, or in excess of that which has been lawfully voted;² or a sum which has been voted for an unlawful purpose.³ And an assessor is personally liable if he

Bennett v. Buffalo, 17 N. Y. 383; *Clark v. Norton*, 49 N. Y. 243; *Dorwin v. Strickland*, 57 N. Y. 492; *Wade v. Matterson*, 4 Lans. 159; *Westfall v. Preston*, 49 Barb. 349; *Bailey v. Buell*, 59 Barb. 158, 50 N. Y. 662; *Henry v. Edson*, 2 Vt. 499; *Fairbanks v. Kittredge*, 24 Vt. 9. In New York, where a farm is situated in two towns, it is assessable only in the one in which the owner resides, and an assessment in the other would render the assessor liable: *Dorn v. Backer*, 61 N. Y. 261, reversing 61 Barb. 597. But where one is assessed in the wrong town by his own request, he cannot maintain an action against the assessors for so assessing him: *Pease v. Whitney*, 8 Mass. 93.

¹ As where a school tax is levied which was voted at a meeting not legally called: *Bussey v. Leavitt*, 12 Me. 378; *Baldwin v. McClinch*, 1 Me. 102; *Colby v. Russell*, 3 Me. 227; *Mussy v. White*, 3 Me. 290; *Gardiner v. Gardiner*, 5 Me. 133; *Paine v. Ross*, 5 Me. 400; *Johnson v. Goodridge*, 15 Me. 29; *Barnard v. Argyle*, 20 Me. 296; *Kellar v. Savage*, 20 Me. 199; *Withington v. Eveleth*, 7 Pick. 106; *Little v. Merrill*, 10 Pick. 543. A tax-list made out before a tax is voted is void: *Mead v. Gale*, 2 Denio 232; *Gale v. Mead*, 4 Hill 109. This was a case in which a tax had been voted and the vote afterwards repealed, and at a later meeting the repealing vote itself repealed. *Held*, that the tax

was to be regarded as voted at the date of the last meeting. But assessors are not bound to go behind the records to see that a meeting was properly called: *Saxton v. Nimms*, 14 Mass. 315; *Libby v. Burnham*, 15 Mass. 144.

² *Libby v. Burnham*, 15 Mass. 144; *Joyner v. School District*, 3 Cush. 567; *Grafton Bank v. Kimball*, 20 N. H. 107; *Drew v. Davis*, 10 Vt. 506.

³ *Stetson v. Kempton*, 13 Mass. 271; *Drew v. Davis*, 10 Vt. 506. The liability in such cases, however, would probably depend upon the position the assessor occupies under the statutes of his state relative to the vote. If the assessor is himself to take from the township records the sums voted, and spread them upon the roll, or if they are certified to him in detail, so that he is necessarily informed before he is required to act officially what sums are legal and what illegal, it seems clear that he cannot fall back upon the vote for his protection. But if, on the other hand, some other officer is required to certify to him in gross the sums voted, and he is then to spread the amount on the roll, this certificate, if in due form, like process fair on its face, should constitute his sufficient protection, and he cannot be held bound to inquire for illegalities behind it: See *Wall v. Trumbull*, 16 Mich. 228; *Parish v. Golden*, 35 N. Y. 462. And compare *Judd v. Thompson*, 125 Mass. 553.

commits to a collector a tax-warrant which is void for defects on its face,¹ or a warrant for a tax purporting to have been voted by a school district which has no existence.² So, also, he is liable if, knowing that stock has already been assessed lawfully by another assessor, he again assesses it and sells it for taxes.³

It is not an excess of jurisdiction, however, if the officer erroneously includes in his estimate property not belonging to the person assessed or not within the district, the party himself being subject to the jurisdiction;⁴ nor where, in listing for taxation persons and property within the jurisdiction, a resident is erroneously listed for taxation who is not liable;⁵ nor

¹ Atwell v. Zeluff, 26 Mich. 18.

² Dickinson v. Billings, 4 Gray 42; Judd v. Thompson, 125 Mass. 553.

³ Taylor v. Robertson, 16 Utah 330.

⁴ Stickney v. Bangor, 30 Me. 404; Hemingway v. Machias, 33 Me. 445; Williams v. Saginaw, 51 Mich. 120; Brown v. Smith, 24 Barb. 419. But in an action against assessors for wrongfully assessing realty of a foreign corporation as resident and selling the corporation's property for the tax, they cannot defeat liability on the theory that their action was judicial or in good faith: New York Milk Products Co. v. Damon, 57 App. Div. (N. Y.) 261.

⁵ Easton v. Calendar, 11 Wend. 90; Barhyte v. Shepherd, 35 N. Y. 238, 255; Weaver v. Devendorf, 3 Denio 117; Vail v. Owen, 19 Barb. 22; Brown v. Smith, 24 Barb. 419; Bell v. Pierce, 48 Barb. 51; Huggins v. Hinson, 1 Phil. N. C. 126. Compare Odiorne v. Rand, 59 N. H. 504; National Bank v. Elmira, 53 N. Y. 49. A contrary decision was made in Gridley v. Clark, 2 Pick. 403, but the point was not discussed. Afterwards statutes were passed in Massachusetts to

protect assessors in some cases, as where, through mere error and while acting with integrity and fidelity, they assessed a person not taxable. See Baker v. Allen, 21 Pick. 382; Durant v. Eaton, 98 Mass. 469. So the statute of 1823 provided that assessors shall not be responsible for the assessment of any tax upon the inhabitants of any city, town, district, parish, or religious society of which they are assessors, when thereto required by the constituted authorities thereof, but the liability, if any, shall rest solely with such city, etc. *Held*, under this, that assessors were not liable for errors of law committed without fraud or intentional wrong: Ingraham v. Doggett, 5 Pick. 451; Dwinnels v. Parsons, 98 Mass. 470. But where the regular assessment has been made for the year, and without authority of law they make another, they are liable: Inglee v. Bosworth, 5 Pick. 498. And see further, Gage v. Currier, 4 Pick. 399; Freeman v. Kenney, 15 Pick. 44; Suydam v. Keys, 13 Johns. 444; People v. Chenango Supervisors, 11 N. Y. 573; Lyman v. Fiske, 17 Pick. 231; Baker v. Allen, 21 Pick. 382;

where through error in judgment he omits from his roll persons or property which ought to be taxed, thereby increasing the tax upon others;¹ nor where he extends on his roll a tax levied under an unconstitutional law.² The imperfection of human judgment is such that cases falling within this principle are unfortunately of frequent occurrence.³

Possibly, assessors should be held liable if, by neglect of

Griffin v. Rising, 11 Met. 339. The above statute held not to apply to school districts: Little v. Merrill, 10 Pick. 543; Taft v. Wood, 14 Pick. 362. An act exempting assessors from responsibility except "only for the want of integrity and fidelity on their own part," held not to protect them for assessing a school tax for a district having no legal existence: Bassett v. Porter, 4 Cush. 487, 10 Cush. 418; Dickinson v. Billings, 4 Gray 42; Judd v. Thompson, 125 Mass. 553. But in such a suit it does not devolve on the assessors to prove a legal organization. The organization in fact, and action as a district, are sufficient *prima facie*: Stevens v. Newcomb, 4 Denio 437.

¹ Dillingham v. Snow, 5 Mass. 559. Where taxes were irregularly assessed and paid over to the county and town, and the assessors, to avoid suit, refunded it to the taxpayers, and the town voted to refund to them, this was held a good promise as to the town tax, but not as to the others. Nelson v. Mulford, 7 Pick. 18. As to the liability of assessors for refusing to assess the plaintiff, whereby he lost his right to vote, see Griffin v. Rising, 11 Met. 339. A statute providing that no error, mistake, or omission of assessors of taxes shall render their assessment void, but giving to the taxpayer a right of action for any damages he may have sustained by reason

of such mistakes, errors, or omissions, does not apply to cases of omission to include in the assessment roll all the property sought to be taxed; there being other adequate remedies for such omission, among them recourse to the equity jurisdiction of the supreme court: Emery v. Sanford, 92 Me. 525.

² Edes v. Boardman, 58 N. H. 580.

³ Parkinson v. Parker, 48 Iowa 667; McDaniel v. Tebbetts, 60 N. Y. 497. In Boody v. Watson, 64 N. H. 162, it is held that assessors act judicially in determining what property is taxable and what exempt, and that they are not liable in damages to a person injured by their exemption of taxable property in pursuance of an illegal rate of the town. And in Robinson v. Rowland, 33 Hun 30, assessors were held not liable personally for error in judgment in deciding whether, upon the facts, one was liable to a dog tax. See People v. Williams, 90 Hun 501. It was, however, held in Ford v. McGregor, 20 Nev. 446, that in assessing property not taxable the assessor acts ministerially, and not judicially, and is personally liable. That an irregular assessment affords no cause of action against the assessors, see Sanford v. Dick, 15 Conn. 447; Sprague v. Bailey, 19 Pick. 436.

duty, they deprive the taxpayer of the opportunity of being heard before the board of review.¹ The distinction which runs through the cases is between an unlawful assumption of authority which has not been conferred, and a mistaken, erroneous or irregular exercise of authority actually possessed; the former will render any officer liable irrespective of the good faith of his action; for the latter he is, in general, not liable at all.² The law which governs the whole subject is summed

¹ See *Thames Manuf. Co. v. Lathrop*, 7 Conn. 550. In this case it appeared that the law required the assessment list to be filed for inspection by the 1st of December. It was not filed until the 20th of that month, but this was ten days before the meeting of the board of relief. *Held*, that the selectmen who took out a tax warrant on this list, by virtue of which the property of a person taxed was seized, were liable in trespass. See note on this case in 25 Vt. 27. In New York, where, by statute, the last assessment roll of the township was to govern in levying a school tax, except as changes were made, of which notice was to be given to the parties affected before the assessment was completed, it was held that the omission of this notice did not render the assessors liable as trespassers: *Randall v. Smith*, 1 Denio 214, citing with approval *Eaton v. Callendar*, 11 Wend. 90, where trustees of a school district were held not liable, though they had erroneously added collection fees to the amount to be raised, and omitted to assess three individuals; the court holding that the apportionment of the tax was to a certain extent a judicial act, and that, "though the trustees may err in point of law or in judgment, they should not be either civilly or criminally answer-

able, if their motives are pure." The court distinguish *Alexander v. Hoyt*, 7 Wend. 89, in which the school assessment was made from a town assessment not finished and afterwards changed, and where the trustees were held to be trespassers. But *Randall v. Smith* is overruled by *Jewell v. Van Steenburgh*, 58 N. Y. 85, where the failure to give notice is held a fatal defect in jurisdiction.

² In many cases, jurisdiction depends on questions of fact; as where, for instance, the question is one of residence. But these questions the assessor must decide correctly at his peril; he cannot, by his own error, obtain a jurisdiction which the law has not conferred: *Dorwin v. Strickland*, 57 N. Y. 492; *Whitney v. Thomas*, 23 N. Y. 281; *Mygatt v. Washburn*, 15 N. Y. 316. Where the assessor increased the valuation of a person's property, after the list had passed beyond his control, he was held liable: *Bristol Manufacturing Co. v. Gridley*, 28 Conn. 201. Where corporations chartered by congress are made non-taxable by the states, they are not within the jurisdiction of assessors, who are liable if they assess them: *National Bank v. Elmira*, 53 N. Y. 49, citing many cases. See *Dorn v. Backer*, 61 N. Y. 261. If assessors whose only power by law,

up in few words in a leading case decided in Massachusetts: "When judicial officers, deriving their authority from the law, mistake or err in the execution of their authority, in a case clearly within their jurisdiction, which they have not exceeded, we know of no law declaring them trespassers *vi et armis*. If the law were otherwise respecting assessors, who, when chosen, are compellable to serve or pay a fine, hard indeed would be their case. But the same law must apply to them as to inferior judicial officers. If, therefore, the persons acting as assessors have been duly chosen and qualified to execute that office, if the sum assessed has been legally ordered to be assessed, if the assessment be made and the warrant of collection be issued by them or a major part of them, in due form of law, if the poll and estate of the party complaining of the assessment be legally taxable, he cannot, in our opinion, maintain an action against them as trespassers *vi et armis* for any error or mistake of theirs in the exercise of their discretion."¹

It has been made a question whether these principles should apply to a case in which these officers are accused of having been actuated by malice, and when the impelling motive has been to inflict injury upon the parties assessed. It has already been seen that assessments, purposely made excessive through evil motive, may be reached and corrected in equity. But to subject every tax officer to the necessity of explaining and justifying his motives to the satisfaction of others, under a penalty of personal responsibility, is perhaps to go beyond what is necessary to the protection of taxpayers; and in matters depending on judgment of values would be so dangerous to the officers that it is doubtful if sound policy could sanction it. In a leading case in New York it is declared that the question of motive is not to be raised in a suit against assessors who have kept within their jurisdiction. The assessors, it was said, were

when the person assessed furnishes no list, is to double the value of the apparent taxable property, proceed instead to fix on rumor a value on property not visible, they act without jurisdiction and are liable: *Howes v. Bassett*, 56 Vt. 141.

v. Snow, 5 Mass. 559. If assessors assess non-resident real estate as resident, but the owner, knowing the course prescribed by law, so acts as to appear to acquiesce, he will be awarded no damages for the error: *Hilton v. Fonda*, 86 N. Y. 339.

¹ *Parsons*, Ch. J., in *Dillingham*

judges acting clearly within the scope and limit of their authority. They were not volunteers, but the duty was imperative and compulsory; and acting, as they did, in the performance of a public duty, in its nature judicial, they were not liable to an action, however erroneous or wrongful their determination may have been or however malicious the motive which produced it. Such acts, when corrupt, may be punished criminally, but the law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of a judicial duty. The rule extends to judges from the highest to the lowest; to jurors, and to all public officers, whatever name they may bear, in the exercise of judicial power. It of course applies only where the judge or officer had jurisdiction of the particular case, and was authorized to determine it. If he transcends the limits of his authority, he necessarily ceases, in the particular case, to act as a judge, and is responsible for all consequences. But with these limitations, the principle of irresponsibility, it was said, so far as respects a civil remedy, is as old as the common law itself.¹ There is some apparent dissent from this doctrine, but it can hardly be said that there is opposing authority.²

¹ *Beardsley, J.*, in *Weaver v. Devendorf*, 3 Denio 117, 120. Compare *Gregory v. Brooks*, 37 Conn. 365; *Baker v. State*, 27 Ind. 485; *Walker v. Hallock*, 32 Ind. 239; *Auditor v. Atchison, etc. R. Co.*, 6 Kan. 500; *Pike v. Magoon*, 44 Mo. 491, 497; *Burton v. Fulton*, 49 Pa. St. 151. A collector of customs is not liable to a private action for the manner in which he exercises his authority to make sale of personal property: *Gould v. Hammond*, 1 McAll. 235. It was held in *Taylor v. Robertson*, 16 Utah 330, that where an assessor, in the absence of cause to believe that the owner is likely to avoid payment of taxes, assesses and sells stock under the revenue act, he is liable. The presumption being that official duty has

been regularly performed, an averment, in a suit against an assessor for damages for breach of official duty, that he "wilfully and against law" overvalued certain property, does not charge the intent to injure the owner which is necessary to sustain the action: *Ballerino v. Mason*, 83 Cal. 447. For an unlawful arrest by a tax collector for non-payment of taxes the assessors are not liable. The collector is not their servant, and they are not liable for his illegal acts: *Rowe v. Friend*, 90 Me. 241.

² See *Dillingham v. Snow*, 5 Mass. 547; *Parkinson v. Parker*, 48 Iowa 667; *Stearns v. Miller*, 25 Vt. 20. And compare *Babcock v. Granville*, 44 Vt. 325. In *Bailey v. Berkey*, 81 Fed. Rep. 737, it was held that an assessor, though

The same reasons which exempt assessors from responsibility to taxpayers exempt them also when the injury from erroneous action results to the public instead of to individuals. Assessors are not therefore liable to a parish in failing to levy a tax equal to the amount voted, where they have acted under an honest belief that they were carrying out the views of the parish.¹ Nor for neglect to commit the tax-list to the proper collector, when by an honest mistake of duty it has been committed to another.²

For malfeasance in office assessors as well as other officers are liable to criminal penalties.³

Action against supervisors. The supervisors of townships in some states act in several capacities. They are members of the township board, and as such pass upon claims against the township; they meet in convention and constitute the county board which audits the county claims and votes the county taxes, and perhaps they act as assessors also, and issue process for the collection of the taxes after they have been properly spread upon the roll. Thus their action in each of these capacities may affect the taxpayer; but the cases must be rare in which the party aggrieved could look beyond the supervisor's action as assessor, if that was not in itself illegal, and maintain an action against him as supervisor for something done in another capacity. Thus, it has been held in New York that supervisors who issue a tax warrant, having jurisdiction to do

acting judicially when listing property for assessment, and not liable for mere errors or mistakes of judgment, is liable for damages resulting from an excessive assessment made maliciously or corruptly. As to special action against assessors by a party who is injured by them, see *Hayford v. Belfast*, 69 Me. 63.

¹ *First Parish v. Fiske*, 8 Cush. 264. Nor are they liable for failure to take the official oath: *Ibid.*

² *Lincoln v. Chapin*, 132 Mass. 470.

³ *Dillingham v. Snow*, 5 Mass.

547. An assessment of property at less than its actual value, if made with the purpose of enabling the one assessed to avoid taxation, is not a refusal or neglect to perform official duty, but a "wilful and corrupt misconduct in office," for which the assessor might be accused by the grand jury; but if made in the ordinary exercise of his official duty, without any corrupt or illegal motive, it is of a judicial nature for which he is not amenable to the penal laws of the state: *Siebe v. Superior Court*, 114 Cal. 55.

so, are not liable in trespass for having included in the levy a sum improperly allowed by them to a county officer.¹ The like decision has been made in Michigan, where a supervisor was sued for placing upon the roll allowances unlawfully made by the township board of which he was a member.² But in Michigan, the supervisor who undertakes to justify the issuing of a tax warrant does not make out his justification by proving his official character merely; he must show that the sums to be levied have been certified to him by the competent authorities, and that the assessment roll has come to him from the board of supervisors as provided by law. These are prerequisites to his jurisdiction to issue any tax warrant.³ And if a tax is assessed on lands as a personal charge against a resident, the description on the roll must be sufficient to identify the land; and if not, that particular assessment will be void and its enforcement will render him liable.⁴ In Iowa, township trustees are held not liable for a refusal to issue a certificate of compliance with the conditions upon which a tax has been voted in aid of a corporation, unless they act wilfully and corruptly.⁵ In Michigan it is said that in no case can the failure of the supervisor to list property for taxation in accordance with law constitute a legal wrong to an individual unless he can show that his individual assessment is thereby made a larger proportion of the aggregate taxable property than it should have been.⁶

Resisting collection. It is stated on a preceding page that, if a tax is unlawful, the person taxed may resist the exaction instead of submitting to it and bringing suit afterwards. This is only a statement of a general principle of the common law, which recognizes the individual liberty of every person to refuse to obey an unlawful demand. Where, however, the tax warrant on its face discloses no illegality, it is well settled that resistance to the officer is not permitted, notwithstanding

¹ *Parish v. Golden*, 35 N. Y. 462.

² *Wall v. Trumbull*, 16 Mich. 228. See *Smith v. Crittenden*, 16 Mich. 152; *Cunningham v. Mitchell*, 67 Pa. St. 78.

³ *Clark v. Axford*, 5 Mich. 182.

⁴ *Atwell v. Zeluff*, 26 Mich. 118.

⁵ *Muscatine Western R. Co. v. Horton*, 38 Iowa 33.

⁶ *Moss v. Cummings*, 44 Mich. 359.

illegalities lie back of it;¹ and it can seldom be advisable or even safe to do otherwise than submit to the process and seek the proper remedy afterwards. But where lands are sold, the peaceful and quiet remedy which consists in retaining possession, and leaving the purchaser to resort to his suit at law, is usually all that is necessary, and under the statutes of limitation will, after a time, become completely effectual, unless the purchaser resorts to the courts for a remedy on his own behalf.

Liability of collector. In general, any officer whose duties are merely ministerial, and to whom process is issued which is apparently in due form of law, and which neither in its recitals or in its omissions apprises him that it is issued without legal right, will be protected in serving it, even though, in fact, it was issued without authority of law. This is a rule not only essential to the protection of such officers, but absolutely required also for the due dispatch of public business.² It would

¹ See cases cited in the next note.

² *Erschine v. Hohnbach*, 14 Wall. 613; *Bailey v. Railroad Co.*, 22 Wall. 604; *Lott v. Hubbard*, 44 Ala. 593; *Grumon v. Raymond*, 1 Conn. 40; *Thames Manuf. Co. v. Lathrop*, 7 Conn. 550; *Watson v. Watson*, 9 Conn. 140; *Prince v. Thomas*, 11 Conn. 472; *Neth v. Crofut*, 30 Conn. 580; *Dennis v. Shaw*, 5 Gilm. 405; *Allen v. Scott*, 13 Ill. 80; *Hill v. Figley*, 25 Ill. 156; *Noland v. Bushby*, 28 Ind. 154; *Brainerd v. Head*, 15 La. 489; *Ford v. Clough*, 8 Me. 334; *Kellar v. Savage*, 20 Me. 199; *Tremont v. Clark*, 33 Me. 482; *State v. McNally*, 34 Me. 210; *Caldwell v. Hawkins*, 40 Me. 526; *Judkins v. Reed*, 48 Me. 386; *Bethel v. Mason*, 55 Me. 501; *Nowell v. Tripp*, 61 Me. 426; *Colman v. Anderson*, 10 Mass. 105; *Holden v. Eaton*, 8 Pick. 436; *Sprague v. Bailey*, 19 Pick. 436; *Upton v. Holden*, 5 Met. 360; *Aldrich v. Aldrich*, 8 Met. 102; *Lincoln v. Worcester*, 8

Cush. 55; *Hays v. Drake*, 6 Gray 387; *Howard v. Proctor*, 7 Gray 128; *Williamstown v. Willis*, 15 Gray 427; *Cheever v. Merritt*, 5 Allen 563; *Underwood v. Robinson*, 106 Mass. 296; *Le Roy v. East Saginaw City Railway Co.*, 18 Mich. 233; *Bird v. Perkins*, 33 Mich. 28; *Wood v. Thomas*, 38 Mich. 686; *Curtiss v. Witt*, 110 Mich. 131; *Turner v. Franklin*, 29 Mo. 285; *Glasgow v. Rowse*, 43 Mo. 479; *St. Louis Building, etc. Assoc. v. Lightner*, 47 Mo. 393; *State v. Dulle*, 48 Mo. 282; *Walden v. Dudley*, 49 Mo. 419; *Ranney v. Bader*, 67 Mo. 476; *Blanchard v. Goss*, 2 N. H. 491; *Henry v. Sargeant*, 13 N. H. 321; *State v. Weed*, 21 N. H. 262; *Rice v. Wadsworth*, 27 N. H. 104; *Keniston v. Little*, 30 N. H. 318; *Kelley v. Noyes*, 43 N. H. 209; *Beach v. Furman*, 9 Johns. 228; *Warner v. Shed*, 10 Johns. 138; *Savacool v. Boughton*, 5 Wend. 171; *McGuinty v. Herrick*, 5 Wend. 240, 243; *Wilcox v. Smith*, 5 Wend.

seem to be impolitic in a very high degree to compel such an officer to ascertain, at his peril, the illegalities that might lie back of a process apparently legal, and it might be justly expected to force prudent men to decline the office altogether, or to proceed with such hesitation and circumspection as sometimes to render the process of little or no avail.¹ The general rule is, that such an officer is legally protected against any

231; *Alexander v. Hoyt*, 7 Wend. 89; *Reynolds v. Moore*, 9 Wend. 35, 36; *Coon v. Congden*, 12 Wend. 496, 499; *Webber v. Gray*, 24 Wend. 485; *People v. Warren*, 5 Hill 440; *Cornell v. Barnes*, 7 Hill 35; *Sheldon v. Van Buskirk*, 2 N. Y. 473; *Chegaray v. Jenkins*, 5 N. Y. 376; *Bennett v. Burch*, 1 Denio 141; *Abbott v. Yost*, 2 Denio 86; *Dunlap v. Hunting*, 2 Denio 643; *Patchin v. Ritter*, 27 Barb. 34; *State v. Lutz*, 65 N. C. 503; *Gore v. Mastin*, 66 N. C. 371; *Loomis v. Spencer*, 1 Ohio St. 153; *Moore v. Allegheny City*, 18 Pa. St. 55; *Billings v. Russell*, 23 Pa. St. 189; *Burton v. Fulton*, 49 Pa. St. 151; *Cunningham v. Mitchell*, 67 Pa. St. 78; *McLean v. Cook*, 23 Wis. 364; *State v. Jervy*, 4 Strobb. 304. The rule applies to a case where the amount of the tax has been fraudulently raised on the assessment roll: *Sanders v. Simmons*, 30 Ark. 272. And where the assessment was void for excess, but the warrant was in due form: *Cone v. Forest*, 126 Mass. 97; *Byles v. Gennung*, 52 Mich. 504. The collector's authority to seize personalty and sell the same for delinquent taxes proceeds not from the tax-roll but from the warrant, and where the latter is fair on its face it protects him even though, prior to the sale, a demand is made for a return of the property: *Curtiss v. Witt*, 110 Mich. 131. The fact that

one has been taxed by mistake for property belonging to another does not make the tax-warrant invalid. The collector is not bound to inquire into such matters: *Woolsey v. Morris*, 96 N. Y. 311, citing *Webber v. Gay*, 24 Wend. 486; *People v. Warren*, 5 Hill 440. See *Cunningham v. Mitchell*, 67 Pa. St. 78. If a collector has several processes, some of which are valid and others either not fair on their face, or otherwise invalid to the officer's knowledge, a levy by virtue of all does not make him a trespasser: *Woolsey v. Morris*, 96 N. Y. 311. That while the assessors are protected, the collector who collects the tax is protected also, as well as the town, county, etc., to which the money is paid over, see *People v. Arguello*, 37 Cal. 524; *Holton v. Bangor*, 23 Me. 264; *Gilpatrick v. Saco*, 57 Me. 277; *Little v. Greenleaf*, 7 Mass. 236; *Osborn v. Danvers*, 6 Pick. 98; *Bates v. Boston*, 5 Cush. 93; *Howe v. Boston*, 7 Cush. 273; *Lincoln v. Worcester*, 8 Cush. 55; *Glasgow v. Rowse*, 43 Mo. 479; *Ontario Bank v. Bunnell*, 10 Wend. 186; *Wharton v. Birmingham*, 37 Pa. St. 371.

¹ In Vermont the ruling is different, and a treasurer sued in trespass, for taking goods on a warrant of distress, for taxes, cannot rely on a valid warrant, but must show that all the previous

illegalities, except those committed by himself,¹ and it is not illegal for him to execute process which comes to him as a ministerial officer, from other officers whose action he has no authority to revise or review.² Indeed, if we are to judge by the weight of authority, it is more than doubtful if he has any right to do otherwise than to proceed with its execution, even though he may be satisfied that lying back of it are illegalities which would defeat the tax and entitle one who should pay it to reimbursement. There are cases which hold that if he knows of such illegalities, the officer will be liable if he proceeds to execute the process;³ but there are many more to the contrary,⁴ and some go so far as to intimate that under such circumstances he is not at liberty to decline service.⁵ This, however, is going farther than seems called for by any rule of public policy, and there are authoritative rulings the other way.⁶ As the officer would be liable on his bond for a breach

proceedings were legal: *Redfield*, J., in *Collamer v. Drury*, 16 Vt. 574, 578. To the same point are *Downing v. Roberts*, 21 Vt. 441; *Hathaway v. Goodrich*, 5 Vt. 65; *Spear v. Tilson*, 24 Vt. 420; *Shaw v. Peckett*, 25 Vt. 423. See, also, *Downer v. Woodbury*, 19 Vt. 329; *Wheelock v. Archer*, 26 Vt. 380. But the rule seems to be the reverse of this in that state, when suit is brought for taxes, for then it is held the burden is upon the defendant to impeach the regularity and validity of the list: *Macomber v. Center*, 44 Vt. 235, citing *Willson v. Seavey*, 38 Vt. 221.

¹ *Carville v. Additon*, 62 Me. 459.

² *Erskine v. Hohnbach*, 14 Wall. 613; *Nowell v. Tripp*, 61 Me. 426; *Moore v. Allegheny City*, 18 Pa. St. 55. Though a levy of school taxes is illegal, the collector is protected if his warrant is fair on its face, unless he was one of the assessors: *Peckham v. Bicknell*, 11 R. I. 596.

³ *Leachman v. Dougherty*, 81 Ill. 324; *Grace v. Mitchell*, 31 Wis. 533.

⁴ *Watson v. Watson*, 9 Conn. 140; *Brainerd v. Head*, 15 La. An. 489; *Wilmarth v. Burt*, 7 Met. 257; *Wall v. Trumbull*, 16 Mich. 228; *Bird v. Perkins*, 33 Mich. 28; *Webber v. Gay*, 24 Wend. 485. See *Twitchell v. Shaw*, 10 Cush. 46; *Cunningham v. Mitchell*, 67 Pa. St. 78.

⁵ *Watson v. Watson*, 9 Conn. 140; *Gove v. Newton*, 58 N. H. 359.

⁶ *Davis v. Wilson*, 61 Ill. 527; *Earl v. Camp*, 16 Wend. 562; *Horton v. Hendershot*, 1 Hill 118; *Cornell v. Barnes*, 7 Hill 35; *Dunlap v. Hunting*, 2 Denio 643. See *Newberg v. Munshower*, 79 Ohio St. 617; *Cunningham v. Mitchell*, 67 Pa. St. 78; *Hill v. Wait*, 5 Vt. 124. A collector who, before levying, is informed that the tax is void and will not be paid, cannot rely for an estoppel upon previous statements made by the owner's attorney who was unaware of the illegality of the tax, and was only authorized to pay the legal taxes: *St. Louis & S. F. R. Co. v. Epperson*, 97 Mo. 300.

of public duty if he should refuse to act in a proper case, it may be assumed he will not expose himself to the risk unless the case is very clear, so that the probability of his declining to enforce a legal tax is very slight. The rule of protection goes so far that he is not liable to one who is unlawfully taxed, by reason of not residing within the district for which the tax is levied;¹ nor does the fact that sums are included in the warrant, which were never lawfully voted, render him liable.² And he is protected in executing his warrant by arrest, notwithstanding the person taxed has been discharged in bankruptcy,³ and though his authority is defective, he may receive officially voluntary payments.⁴

What process is apparently legal. Process may be said to be fair on its face which proceeds from a court, officer, or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise any one that it is issued without authority.⁵ It is not easy to lay down any general rule as to what will constitute a defect in the process which should put the collector on his guard. Where the law required the assessment roll to be attached to the warrant, and the certificate attached thereto was not in accordance with the law, it was held that the warrant could not be said to be fair on its face, and the collector was liable for executing it.⁶ The same ruling was made where the warrant showed on its face that a certain tax included in it could not lawfully have been placed in the list for that year.⁷ And so where the affidavit, which was required

¹ Nowell v. Tripp, 61 Me. 426; Holden v. Eaton, 8 Pick. 436; Savacool v. Boughton, 5 Wend. 171. See Phelps v. Thurston, 47 Conn. 477.

² Lincoln v. Worcester, 8 Cush. 55; Abbott v. Yost, 2 Denio 86.

³ Wilmarth v. Burt, 7 Met. 257; Aldrich v. Aldrich, 8 Met. 102.

⁴ Johnson v. Goodridge, 15 Me. 29; Orono v. Wedgewood, 44 Me. 49; Trescott v. Moan, 50 Me. 347; Sandwich v. Fish, 2 Gray 298; Cheshire v. Howland, 13 Gray 321;

Williamstown v. Willis, 15 Gray 427; State v. Woodside, 8 Ired. 104, 9 Ired. 496. Compare Waters v. State, 1 Gill 302; O'Neal v. School Com'rs, 27 Md. 227; Moore v. Allegheny City, 18 Pa. St. 55; Commonwealth v. Philadelphia, 27 Pa. St. 497.

⁵ Cooley on Torts, 460, 464. See Bradley v. Ward, 58 N. Y. 401.

⁶ Van Rennselaer v. Witbeck, 7 N. Y. 517.

⁷ Eames v. Johnson, 4 Allen 382. So where the warrant showed that

to be attached to the roll after the time for reviewing the assessments had expired, appeared to be made prematurely.¹ So where the warrant was issued by a justice of the peace, when, by law, it should have been issued by the supervisors.² So where an unauthorized and material alteration was made in it after it came to the hands of the collector.³ So where, in the case of a special assessment only collectible from lands, the warrant directed the collection as a personal charge.⁴ So where that which is put into the collector's hands as a warrant is not in substance what the statute provides for.⁵ But mere clerical errors may be overlooked in any case, and a departure from a statutory form may be disregarded where the use of the specific form is not made mandatory.⁶

the tax was such as could not be made a personal claim, the collector being, therefore, bound to know that he had no authority to enforce it by seizing personalty: *Mogg v. Hall*, 83 Mich. 576. The collector was held liable in collecting a personal tax from a bank which, by law, was taxable on its realty only: *American Bank v. Mumford*, 4 R. I. 478. Compare *National Bank v. Elmira*, 53 N. Y. 49. That, however, was a suit against the town after the money had been paid over.

¹ *Westfall v. Preston*, 49 N. Y. 349. See, also, *Yelverton v. Steele*, 26 Mich. 62; *Gale v. Mead*, 4 Hill 109; *National Bank v. Elmira*, 53 N. Y. 49.

² *Chalker v. Ives*, 55 Pa. St. 81. And see *Hilbish v. Hower*, 58 Pa. St. 93.

³ *Henry v. Bell*, 75 Mo. 194. But if the collector's warrant was sufficient when property was seized under it, a subsequent alteration by the magistrate who signed it, for the purpose of making it a warrant for another tax, will not invalidate the collector's action: *Goodwin v. Perkins*, 39 Vt. 398.

⁴ *Higgins v. Ausmuss*, 77 Mo. 351.

⁵ *Warrensburg v. Miller*, 77 Mo. 56.

⁶ See *Wilcox v. Gladwin*, 50 Conn. 77. Process issued to one as "constable and collector" will be sufficient, if in fact he was authorized to act as collector when it was issued to him: *Hays v. Drake*, 6 Gray 387. And a collector is not a trespasser in seizing property by virtue of two warrants, if either of them is sufficient: *Ibid.* A warrant attached to a tax-list, and signed by the supervisors, was held to be fair on its face, though they failed to add the official title to their names: *Sheldon v. Van Buskirk*, 2 N. Y. 473. A warrant issued in pursuance of law for the collection of a tax from one who has removed from the township is sufficient, though it fails to recite the fact of removal: *Cheever v. Merritt*, 5 Allen 563. And see *Sherman v. Torrey*, 99 Mass. 472; *Hubbard v. Garfield*, 102 Mass. 72. So it will protect the officer where the only defect is a failure to insert the direction to sell distrained

But though a valid process will protect an officer against personal responsibility, it will not enable him to build up a title to property seized by virtue of it, either general or special. While, therefore, he might have a perfect defense to a suit brought against him in trespass for seizing property, he might not successfully defend an action of replevin, or any other action in which the legal title to the property, or the legal right to possession, was the question at issue. In any such action it would not be sufficient for him that the process under which he acted appeared to be valid on its face, but it should be valid in fact.¹ This is an important distinction, which, however, is not recognized by all the cases.²

Accounting for illegal taxes. If a collector succeeds in securing payment of a sum levied as a tax, under a warrant which would not protect him for a reason going to the foundation of the levy, he can have no just claim whatever to retain it, and would be liable to refund it on demand.³ But in general, if the money, though actually collected by compulsion, is paid

goods within seven days, according to law: *King v. Whitcomb*, 1 Met. 328. And for other cases, where questions of validity of process have been raised, see *Mussey v. White*, 3 Me. 290; *Bachelder v. Thompson*, 41 Me. 539; *Stephens v. Wilkins*, 6 Pa. St. 260; *Bank of Chenango v. Brown*, 26 N. Y. 467; *Barnard v. Graves*, 13 Met. 85; *Arnett v. Griffin*, 60 Ga. 349.

¹ *Beach v. Botsford*, 2 Doug. (Mich.) 199; *Le Roy v. East Saginaw*, 18 Mich. 233; *McCoy v. Anderson*, 47 Mich. 502; *Earl v. Camp*, 16 Wend. 562.

² See *McKay v. Batchellor*, 2 Colo. 591; *Troy, etc. R. Co. v. Kane*, 72 N. Y. 614.

³ "At common law money unlawfully exacted by a collector of taxes could be recovered back in an action of *assumpsit* brought against him, but to sustain the action the money must have been

paid under duress." Per *Fuller*, Ch. J., in *Saltonstall v. Birtwell*, 164 U. S. 19. Where a tax-collector refuses to accept for taxes coupons tendered in compliance with the statute, and the taxpayer pays money, the latter may in *assumpsit* recover back the amount: *Brown v. Greenhow*, 80 Va. 118. Where the tax-roll was in due form, and the collector has acted within his authority, an action cannot be maintained against him to recover taxes paid under protest as illegally exacted, on the ground that the assessment was at too high a valuation: *Continental L. & C. Co. v. Board*, 80 Tex. 489. To an action for the recovery of taxes paid under compulsion, the town treasurer is not a proper party where the money still remains in the collector's hands: *Lindsay v. Allen*, 19 R. I. 721.

over to the proper receiving officer before suit brought, the collector is protected,¹ and this principle has been applied to cases in which the officer's authority was void for unconstitutionality or other reason.² A prosecution against a tax-collector for collecting illegal taxes must, it has been held, be

¹ Hardesty v. Fleming, 57 Tex. 395. See Burlington, etc. R. Co. v. Buffalo County, 14 Neb. 51. But see Kimball v. Corn Exchange Bank, 1 Ill. App. 209. It was held in Foss v. Whitehouse, 94 Me. 491, that where a tax-collector has demanded and received from a taxpayer more than is due, and more than appears to be due according to his lists, he must refund the excess to the taxpayer, even though he has paid the amount into the town treasury; and if the collector, having arrested a taxpayer for non-payment of taxes, exacts as condition of release a larger sum for fees of arrest and commitment than he is legally entitled to, he must refund not only the excess but the entire sum so exacted; but the amount of a valid tax paid to the collector and by him paid into the town treasury cannot be recovered from the town, or from the collector in an action of *assumpsit*, although the payment was made solely to obtain release from an unlawful duress by the collector. In Phelan v. San Francisco, 120 Cal. 1, it was decided that a tax-collector should pay into the treasury taxes paid to him under protest, though the taxpayer otherwise instructed him, and that he is not liable to such taxpayer for making such payment. It was held in Fish v. Highbee, 22 R. I. (47 Atl. Rep. 212), that an action to recover city taxes illegally assessed should be against the city treasurer and

not against the collector; the latter is the agent of the town or city in collecting the tax, and the municipality is really the only party interested in defending the suit. In Brown v. Pontchartrain Land Co., 49 La. An. 1779, it was said that if money paid at a tax-sale which has been declared void has been paid into the treasury, it should be returned by the state, but no recovery can be had from the tax-collector. In Mulford v. Sutton, 79 N. C. 276, it was held that a tax, if collected by virtue of a tax-list, cannot, though paid under protest, be recovered from the collector. The tax-list has the same force as an execution. In Wood v. Stirman, 37 Tex. 584, it was decided that where a county treasurer collects taxes without authority of law, he alone is liable, and not his sureties or the county, though the money may actually have been paid into the county treasury, and disbursed as other county funds. And in Scottish Union & N. Ins. Co. v. Herriott, 109 Iowa 606, it was held that where a state officer, acting under an invalid law, receives taxes paid under duress and protest, action lies against him for the recovery thereof although the money has been placed to the credit of the state.

² Crutchfield v. Wood, 16 Ala. 702; Brown v. Pontchartrain Land Co., 49 Ala. 1779; Lewis County v. Tute, 10 Mo. 650; Dickens v. Jones, 6 Yerg. 483.

founded upon the statute applicable to this particular offense, and not on statutes permitting prosecutions in general for obtaining money on false pretenses or by use of a cheat, deception, etc.¹

When trespasser ab initio. If the collector levies distress for a tax and afterwards abuses his authority, the warrant becomes no protection to him, and he is held to be a trespasser *ab initio*. This rule has been applied in one case where the collector sold the property at half its value within two hours after seizure, and without giving public notice of the time and place of sale.² It has been applied, also, where the collector, after a sale on which he had received a surplus, failed to render to the owner an account in writing of the sale and charges, as required by the statute under which the sale was made.³ And the collector is liable as a trespasser *ab initio* if he keeps the distress until after the time limited by law for making the sale, and then sells it;⁴ or if, having sold enough to satisfy the tax, he proceeds to sell more.⁵ A collector who proceeds directly against

¹ State v. Green, 87 Mo. 583.

² Blake v. Johnson, 1 N. H. 91.

³ Blanchard v. Dow, 32 Me. 557. Where a tax-collector sold a mortgaged mule for the mortgager's taxes, and paid the surplus to the mortgager after demand therefor by the mortgagees, an action for money had and received, by the mortgagees against the collector, is the proper remedy: McDuffee v. Collins, 117 Ala. 487.

⁴ Pierce v. Benjamin, 14 Pick. 356, 360, citing Purrington v. Loring, 7 Mass. 388; Nelson v. Merriam, 4 Pick. 249. See to the same effect, Brackett v. Vining, 49 Me. 356; Farnsworth County v. Rand, 65 Me. 19. *Contra*, Ordway v. Ferrin, 3 N. H. 69. And see Bird v. Perkins, 33 Mich. 28. Where a collector of taxes, after seizing property as a distress and advertising it for sale, neglected to sell it at the time appointed, but after-

wards again advertised it the requisite period and sold it upon new advertisement, it was held that neither the neglect to sell at the appointed time, nor the subsequent sale, could make him a trespasser *ab initio*: Souhegan Nail, etc. Factory v. McConihe, 7 N. H. 309.

⁵ Williamson v. Dow, 32 Me. 559; Denton v. Carroll, 4 App. Div. 532, 40 N. Y. Supp. 19. But in such a case he is trespasser only as to the excess: Seekins v. Goodale, 61 Me. 400; Cone v. Forest, 126 Mass. 97. Compare Polk v. Rose, 25 Md. 153. If an officer under two rate bills, one valid and the other invalid, seizes no more property than he is authorized to by virtue of the valid process, and sells the same for more than enough to satisfy the valid process, and then appropriates the excess to satisfy the invalid process, such misap-

the land for taxes, except under the prescribed conditions, is liable as a trespasser.¹ So also is he liable if, by issuing an execution for taxes against one not engaged with business on which the tax in question has been imposed, he coerces, through a levy by the sheriff, the payment of such tax.² If, where there are several taxes on the same list, the tax-collector, ignoring the taxpayer's right to pay any one of them the legality of which he concedes, refuses a tender of one unless all are paid, he will be liable for any compulsory proceedings in respect to such tax.³ A tax-collector, it has been held, is liable to punitive damages if, knowing such levy to be illegal, he levies upon property of a taxpayer who has tendered in payment of the tax coupons receivable therefor under the state law.⁴

Federal collectors. The rules which have been given apply to collectors under the internal revenue laws of the United States, who are protected in like manner in the collection of taxes committed to them by lists fair on their face.⁵ The case

plication does not render the officer a trespasser *ab initio*; to make him a trespasser *ab initio*, the wrongful act must be done to the property taken, not to the fund realized from a legal sale: *Wilson v. Seavey*, 38 Vt. 221, 230. For the law as to what will render one a trespasser *ab initio*, see *Six Carpenters' Case*, 8 Coke 290; *Van Brundt v. Schenck*, 11 Johns. 377, 13 Johns. 414. If one whose property is unlawfully seized and sold by the collector causes it to be bid in for himself and appropriates it to his own use, he can recover in an action against the collector only what he paid for the property on the sale; as that was the extent of his injury: *Hurlburt v. Green*, 41 Vt. 490. As to when the invasion of a person's rights by a sale of his bank-stock for an illegal tax becomes complete so as to render the tax-collector liable, see *Sprague v. Fletcher*, 69 Vt. 69.

¹ *Kean v. Kinnear*, 171 Pa. St. 639. As to the measure of damages in trespass against a tax-collector for resorting to the land for the taxes thereon, instead of collecting them from the personalty belonging to the tenant, who agreed to pay the taxes, see *Ibid.*

² *Stewart v. Atlantic Beef Co.*, 93 Ga. 12.

³ *Bank of Mendocino v. Chalfant*, 51 Cal. 369.

⁴ *Willis v. Miller*, 29 Fed. Rep. 238. The members of the indemnity board created by the Virginia statute to ascertain and allow to a tax-collector the sum proper to cover his liability for damages, etc., are jointly liable with the county treasurer for such trespass: *Ibid.*

⁵ *Erschine v. Hohnbach*, 14 Wall. 613, 616. In this case Mr. Justice *Field* states the rule of protection very clearly and concisely as follows: "Whatever may have been the conflict at one time, in the ad-

of the collector of customs is different. He has no tax-warrant or other process to protect him, and he proceeds at his peril in demanding and receiving what he claims to be demandable as duties. If he collects illegal or excessive duties, and they are paid under protest, he is liable to the person paying for the amount;¹ but he is excused if he pays over the moneys before protest is made.²

judged cases, as to the extent of protection afforded to ministerial officers, acting in obedience to process or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts, and render judgment thereon, it is well settled now that if the officer or tribunal possess jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such case, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued." Citing *Savacool v. Boughton*, 5 Wend. 170; *Earl v. Camp*, 16 Wend. 562; *Chegaray v. Jenkins*, 5 N. Y. 376; *Sprague v. Burchard*, 1 Wis. 457. To the same effect is *Haffin v. Mason*, 15 Wall. 671. And see *Cutting v. Gilbert*, 5 Blatch. 259; *Nelson v. Carman*, 5 Blatch. 511; *Braun v.*

Sauerwein, 10 Wall. 218; *The Collector v. Hubbard*, 12 Wall. 1; *Coblens v. Abel*, 1 Woolw. 293; *First Nat. Bank v. Waters*, 19 Blatch. 242.

¹ *Elliott v. Swartwout*, 10 Pet. 137; *Maxwell v. Griswold*, 10 How. 242. It was held in *Wright v. Blakeslee*, 101 U. S. 174, that no written notice or protest is required of one paying illegal taxes under the internal revenue laws in order to enable him to recover them, an oral protest being sufficient. Where a statute provides for suit against a collector within a given time after an appeal, the provision must be observed strictly: *Cheatham v. United States*, 92 U. S. 85. See *James v. Hicks*, 110 U. S. 272; *Arnson v. Murphy*, 115 U. S. 579; *Louisville Sinking Fund Com'rs v. Buckner*, 48 Fed. Rep. 533. Trover will not lie against a federal collector for seizing property not subject to forfeiture for a breach of the customs laws. The remedy given by the federal statute is exclusive: *McGuire v. Winslow*, 23 Blatch. 425, 26 Fed. Rep. 304. As to recovery of interest, see *McClain v. Pennsylvania Co.*, 108 Fed. Rep. 618, citing *Erskine v. Van Arsdale*, 15 Wall. 75, and *Redfield v. Bartels*, 139 U. S. 694. See, also, *Louisville Sinking Fund Com'rs v. Buckner*, *supra*.

² *Elliott v. Swartwout*, 10 Pet. 137.

Liability of municipal corporations. If a state collects illegal taxes for its own purposes, the several persons from whom the collection is made have claims against it for the repayment of the sums collected from them respectively. The state is trustee of the money for the use of the persons paying it;¹ but whether they can bring suit against the state therefor must depend upon the provision of law which it may have made for the purpose. They cannot sue the state except as by law it may have provided therefor;² and though this is sometimes done,³ it is more usual to give to some auditing board authority in the premises. If an action is given it will be governed by the same rules as apply in actions against municipal corporations, except as the statute may have otherwise provided.

In some states provision is made by law for the refunding by the state, through the counties, of sums illegally collected as state taxes, and under such a provision the county may be sued on a presumption that the state has performed its duty in supplying the means.⁴

The town, village, city, or county for which a tax has been levied and collected may, under some circumstances, be liable to an action at the suit of parties from whom the tax has been exacted.⁵ The case, however, must be exceptional, and the cir-

¹ *Shoemaker v. Grant County*, 36 Ind. 175.

² The board of agriculture, being a department of the state government, cannot, without the state's consent, be sued to recover back a license tax exacted under a public act and paid into the treasury for the sake of fertilizers: *Lord, etc. Co. v. State Board*, 111 N. C. 135, following *North Carolina v. Temple*, 134 U. S. 22. It was held in *Scottish Union & N. Ins. Co. v. Herriott*, 109 Iowa 606, that a suit by a foreign corporation against the state treasurer to recover taxes collected by him under an invalid law is not a suit against the state.

³ It is competent for a state to

couple with its consent to be sued on account of taxes alleged to have been exacted under illegal assessments made by the state board of assessors, the condition that the suit be brought in one of its own courts. Such legislation should be deemed a part of the state's taxing system: *Smith v. Reeves*, 178 U. S. 436.

⁴ *Mills v. Hendricks County*, 50 Ind. 436. In Michigan illegal taxes are charged back by the state to the counties, but not until they have been set aside as illegal: *Auditor-General v. Supervisors*, 36 Mich. 70.

⁵ Under a statute providing that actions to recover back taxes shall be brought against the officer who

cumstances such as to render repayment equitable. In general, an action can only be maintained when the following conditions are found to concur:

made the collection, with the proviso that when the money derived from such taxes has been paid over to a municipal corporation for whose use and benefit it was levied, then the action shall be brought against such corporation, the term "municipal corporation" includes counties: *Kelley v. Rhoads*, 7 Wyo. 237, overruling earlier cases. See *Powder River Cattle Co. v. Board of Com'rs*, 45 Fed. Rep. 323. Where a county places in the hands of an authorized person process directing him to collect and receive taxes for it, a collection made by such person is received by the county: *Galveston County v. Galveston Gas Co.*, 72 Tex. 509. It was held in *Eyerly v. Jasper County*, 72 Iowa 149, that one who has paid to a county treasurer a tax in aid of a railroad, which tax was afterwards declared to be illegal, is not entitled, in an action against the county, to an order requiring the county to direct the treasurer to repay the tax out of funds remaining in his hands. The remedy is by *mandamus* against the treasurer or supervisor to compel the return of the tax. *Assumpsit* lies to recover back money paid into a township treasury in satisfaction of taxes illegally assessed and collected: *Daniels v. Watertown*, 55 Mich. 376. One who pays a personal and poll tax in a town wherein he does not reside may recover it back if paid under the threat of a warrant, notwithstanding he was properly taxed for real estate in that town. This is not to be regarded as a case of excess-

ive taxation from which appeal should be taken; the tax on the personalty and poll being wholly unauthorized: *Preston v. Boston*, 12 Pick. 7. Further, as to the recovery from a town, etc., by non-residents unlawfully taxed therein see *Hathaway v. Addison*, 48 Me. 440; *Sumner v. Dorchester*, 4 Pick. 361; *Inglee v. Bosworth*, 5 Pick. 498; *Dow v. Sudbury*, 5 Met. 73; *Lee v. Boston*, 2 Gray 484; *Dickinson v. Billings*, 4 Gray 42; *People v. Chenango Supervisors*, 11 N. Y. 563. It has been held that if school taxes are levied unlawfully in a district by vote of the town, they may be recovered back of the town: *Powers v. Sanford*, 39 Me. 183. If a non-resident is taxed on personalty in a town where he does not reside, his right to recover it back cannot be affected by his having realty in the town which was omitted from the list: *Hathaway v. Addison*, 48 Me. 440. Where an inhabitant is wrongfully taxed on property held in trust for him abroad, and has no property taxable to him, he may recover back of the town a tax assessed to and paid by him in respect of the property so held in trust: *Dorr v. Boston*, 6 Gray 131, relying upon *Preston v. Boston*, 12 Pick. 7. When by law the personalty of corporations is assessed in the company's shares, but the assessors tax to the corporation both their personalty and realty, and they pay the taxes, they may recover back the tax on the personalty: *Dunnell Manuf. Co. v. Pawtucket*, 7 Gray 277. If the proceedings in the collection of a

1. The tax must have been illegal and void, and not merely irregular.

2. It must have been paid under compulsion or the legal equivalent.

3. It must have been paid over by the collecting officer, and have been received to the use of the municipality.¹

And to these should perhaps be added :

tax are wholly void, and the person taxed neither has been nor can be disturbed in his possession, there is no ground for an action against the town, as the plaintiff has lost nothing. Such would be the case of a void sale of shares in a corporation: *Noyes v. Haverhill*, 11 Cush. 338. It was held in *Esterbrook v. San Francisco*, 115 Cal. 67, that an action cannot be maintained to recover back a special assessment collected by the city and county of San Francisco, though paid under protest. As to recovery back of assessments paid for local improvements subsequently abandoned, see *Valentine v. St. Paul*, 34 Minn. 446; *Strickland v. Stillwater*, 63 Minn. 43; *McConville v. St. Paul*, 75 Minn. 383; *Rogers v. St. Paul*, 75 Minn. 5; *Germania Bank v. St. Paul*, 79 Minn. 29. The value of highway labor in which a tax has been paid is not recoverable: *Tufts v. Lexington*, 72 Me. 516. When a lessee pays a tax which is afterwards set aside in proceedings instituted by the lessor, the lessee is entitled to recover back what he paid: *Purssell v. New York*, 85 N. Y. 330. If one buys land after a tax is assessed on it against his grantor, and pays it before the tax has become a lien under the statute, without making objections to it before the board of review, he is concluded by the payment: *Louden v. East Saginaw*, 41 Mich.

18. For further cases, see *Atwater v. Woodbridge*, 6 Conn. 223; *Adam v. Litchfield*, 10 Conn. 127; *Gillette v. Hartford*, 31 Conn. 351; *First Ecclesiastical Soc. v. Hartford*, 38 Conn. 274; *Stephenson Supervisors v. Manny*, 56 Ill. 160; *Lauman v. Des Moines County*, 29 Iowa 310; *James v. New Orleans*, 19 La. An. 109; *Perry v. Dover*, 12 Pick. 206; *Joyner v. School Dist.*, 3 Cush. 567; *Huckins v. Boston*, 4 Cush. 543; *Bacon v. School Dist.*, 97 Mass. 421; *Nickodemus v. East Saginaw*, 25 Mich. 456; *Foster v. County Com'rs*, 7 Minn. 140; *Hill v. Livingston Supervisors*, 12 N. Y. 52; *Lake Shore, etc. R. Co. v. Roach*, 80 N. Y. 339; *Allen v. Burlington*, 45 Vt. 202; *Matheson v. Mazomanie*, 20 Wis. 191; *Hurley v. Texas*, 20 Wis. 634; *Judd v. Fox Lake*, 28 Wis. 583.

¹ See, as to the general requisites of the section to recover back taxes: *Winter v. Montgomery*, 65 Ala. 403; *Magnolia v. Sharman*, 46 Ark. 358; *Helena v. Dwyer*, 64 Ark. 424; *First Nat. Bank v. Americus*, 68 Ga. 119; *Otis v. People*, 196 Ill. 542; *Dexter v. Boston*, 176 Mass. 247; *Lyons v. Cook*, 114 Mich. 505; *Raleigh v. Salt Lake City*, 17 Utah 130; *Carton v. Board of Com'rs (Wyo.)*, 69 Pac. Rep. 1013. There must be actual payment, and not a mere bargain or arrangement: *Savannah v. Feeley*, 66 Ga. 31.

4. The party must not have elected to proceed in any remedy he may have had against the assessor or collector.¹

Where the statute gives an action, it may not be necessary that all these conditions should concur, since the statute may dispense with one or more of them.² Thus, it has been held in New York that where the statute provides for the repayment of a tax illegally levied, it is no answer to a claim therefor that the payment was voluntarily made.³ In Indiana, where the recovery is allowed of "taxes erroneously assessed and collected," it is not material whether the payment was or was not voluntary;⁴ and in Iowa it has been decided that where a statute allows recovery of taxes "erroneously or illegally exacted or paid," the taxpayer's failure to stay the collection of such tax does not prevent his suing after payment.⁵

¹ *Raleigh v. Salt Lake City*, 17 Utah 130. And conversely, where one illegally assessed has sued the town and recovered satisfaction, such recovery and satisfaction are conclusive in a subsequent suit by him against the assessors: *Ware v. Percival*, 61 Me. 391.

² *Thompson v. Detroit*, 114 Mich. 502, 505.

³ *People v. Madison Supervisors*, 51 N. Y. 442. A tax assessment which has been levied erroneously, but within the assessing officer's jurisdiction, upon the capital stock of a corporation, is not "illegally" levied, and the amount of it cannot be recovered back: *United States Trust Co. v. New York*, 144 N. Y. 488. An owner who has applied to the proper officer to vacate or review his assessment, and who has obtained a reduction and paid the amount, cannot afterwards sue to recover the assessment so paid on the ground that the assessment was wholly illegal: *Hoffman v. New York*, 58 Hun 611.

⁴ *Indianapolis v. Morris*, 25 Ind.

App. 409. See *Isbell v. Crawford County*, 40 Iowa 102. Recovery back of amount which should have been deducted for indebtedness from assessment of national bank shares: *Indianapolis v. Vajen*, 111 Ind. 240. Appearance before equalization board held unnecessary before suit: *Ibid.* See *McWhinney v. Indianapolis*, 101 Ind. 150.

⁵ *Dickey v. Polk County*, 58 Iowa 287. Taxes paid for land illegally sold because the taxes have not been brought forward on the tax-lists may be recovered as taxes "erroneously or illegally exacted or paid:" *Parker v. Cochran*, 64 Iowa 757. One who has paid taxes without making claim for deduction because of indebtedness cannot recover them from the county on the ground that they were "erroneously or illegally exacted or paid:" *Leonard v. Madison County*, 64 Iowa 418. Where a tax is not merely informal and irregular, but illegal and void, as levied on property not liable for taxation, the owner, having paid under protest, may recover it back: *Winzer v. Burling-*

The sum for which any municipality is liable must in general be what has been collected for itself; and therefore when the town collector collects a state, county, and town tax levied on property not taxable, if the town is sued, the recovery will be limited to what was paid over to it for its own use, and will not embrace the state and county taxes.¹ It may be different, however, in the case of taxes collected for the subordinate municipalities. A township is held liable for school and road taxes received into its treasury, even though they have been paid out before suit is brought;² but it would be otherwise if the moneys in the hands of its treasurer constituted a special fund over which by law the corporation had no control.³ A

ton, 68 Iowa 279. Taxes illegally exacted and paid under protest may be recovered back in Iowa although there has been no distraint or seizure of property therefor: *Thomas v. Burlington*, 69 Mo. 140. The right to recover back a tax illegally exacted is not affected by the fact that the city's indebtedness exceeds the constitutional limit: *Ibid.* Where a special assessment not claimed to have been void or paid under protest has been paid, the amount of it cannot be recovered back from the city: *Hawkeye L. & B. Co. v. Marion*, 110 Iowa 468. One who pays an illegal tax on real estate in which he has no interest cannot recover back such tax because of its illegality: *Ibid.* An action held to lie where the proper board had refused to pay, though an appeal was given from its decision: *Richards v. Wapello County*, 48 Iowa 507. See *McWhinney v. Indianapolis*, 101 Ind. 150.

¹ *Vermont Central R. Co. v. Burlington*, 28 Vt. 193. See, also, *Spear v. Braintree*, 24 Vt. 414; *Slack v. Norwich*, 32 Vt. 818; *Matheson v. Mazomanie*, 20 Wis. 191. Where a county treasurer collects and pays over taxes for the state and

for school districts and other municipalities less than and within the county, the county is not liable to the taxpayer for such taxes, even if illegally levied: *Price v. Lancaster County*, 18 Neb. 199. The California statute providing for actions against counties to recover back illegal taxes paid under protest does not authorize an action against a county for taxes collected by it for the use of a school district and placed in the treasury to the credit of the school fund: *Pacific Mut. L. Ins. Co. v. San Diego County*, 112 Cal. 314; *Elberg v. San Luis Obispo County*, 112 Cal. 316.

² *Byles v. Golden T'p*, 52 Mich. 612; *Matteson v. Rosendale*, 37 Wis. 254. Compare *Pawnee County v. Railroad Co.*, 21 Kan. 748; *Saline County v. Geis*, 22 Kan. 381. One who, under protest, has paid a tax levied on a township to liquidate "highway indebtedness" when in fact such "highway indebtedness" was not the township's but a highway district's, can recover it from the township: *McFarlan v. Cedar Creek T'p*, 93 Mich. 558.

³ *Dawson v. Aurelius T'p*, 49 Mich. 479; *Camp v. Algansee T'p*,

tax laid without authority and paid over to a city may be recovered back though the city has paid it out to a contractor.¹

It is immaterial to the liability of a municipal corporation that the officers through whom the illegal tax was enforced were not of its appointment or under its control.² Nor is the liability of such a corporation to repay an assessment collected for improvements under a void statute affected by the fact that the assessment was collected by adding the same to the owner's general tax.³ In Minnesota, one who has paid a wrongful assessment is not entitled to recover it back until he has exhausted his statutory remedies for setting it aside.⁴ In New York it has been held that if tax-officers in the exercise of an actual jurisdiction over person and subject-matter commit an error, their action, though reviewable in a proper proceeding, is not void, and their assessment is protected against the collateral attack of an action to recover back the assessment, as they themselves would be.⁵ And in the latter state money paid under a street assessment, which, though illegal, is not jurisdictionally void, cannot be recovered until the assessment has been vacated.⁶

50 Mich. 4; *Taylor v. Avon T'p*, 73 Mich. 604; *Hillyer v. Jonesfield T'p*, 114 Mich. 644; *Jenney v. Mussey T'p*, 121 Mich. 229. A railroad-aid tax was levied in several towns, and in some it turned out invalid. The county collected the tax, and that from the latter towns was paid over to the railroad company. *Held*, that they were not entitled to recover back from the county: *Des Moines, etc. R. Co. v. Lowry*, 51 Iowa 486. A township cannot recover from the county the amount of a special but invalid township road tax collected by the county and turned over by it to the town clerk: *Stone v. Woodbury County*, 51 Iowa 522.

¹ *Tallant v. Burlington*, 39 Iowa 543; *Louden v. East Saginaw*, 41 Mich. 18. See *Grand Rapids v. Blakely*, 40 Mich. 367.

² *Bank of Commonwealth v. New*

York, 43 N. Y. 184. See, also, *Chapman v. Brooklyn*, 40 N. Y. 372; *Newman v. Livingston Supervisors*, 45 N. Y. 676. Compare *Swift v. Poughkeepsie*, 37 N. Y. 511.

³ *Dexter v. Boston*, 146 Mass. 247.

⁴ *Clarke v. Board of Com'rs*, 47 Minn. 552, 66 Minn. 304. -

⁵ *People v. Coleman*, 107 N. Y. 541; *United States Trust Co. v. New York*, 144 N. Y. 488.

⁶ *Bank of Commonwealth v. New York*, 43 N. Y. 184; *Trimmer v. Rochester*, 130 N. Y. 401. But if the assessment, though valid on its face, is void for want of jurisdiction to make it, an action lies to recover money involuntarily paid in satisfaction thereof, without first having it set aside or vacated: *Bruecher v. Port Chester*, 101 N. Y. 240. See *Jex v. New*

A property owner who has paid an illegal assessment has in his action to recover back his payment no vested right which legislation cannot take away, nor is there any implied agreement to return the assessment, if wrongfully collected, which would invalidate such legislation as impairing the obligation of a contract.¹

Irregular taxes. When a municipal corporation is sued for money collected and paid over to it as a tax, the idea on which the suit is predicated is, that the corporation has received that which, in justice, it ought not to retain. A suit will not, therefore, lie to recover back taxes paid, when the only complaint that can be made of them is that the proceedings in their levy and collection have been irregular. The fact of irregularity does not establish injustice; there must be something further in the case which either exempts the party from the tax altogether, or which, because of illegality or inequality, deprived the officers of jurisdiction.² Municipalities do not guaranty to their people correct action on the part of their officers,³ and if they did no one would be entitled to rely upon the guaranty until he was injured. Irregular action does not necessarily injure the parties concerned; and where it does, the remedies given by review or repeal are supposed to afford full redress.⁴

York, 103 N. Y. 536. And if the assessment was void on its face it is not necessary to have it so judicially declared before bringing suit: *Horn v. New Lots*, 83 N. Y. 100. It would be otherwise, if the invalidity depended on facts which would not appear in proceedings to enforce the assessment: *Ibid.*, citing *Peyser v. Mayor*, 70 N. Y. 497; *In re Lima*, 77 N. Y. 170; *Wilkes v. Mayor*, 79 N. Y. 621, and *Marsh v. Brooklyn*, 59 N. Y. 280.

¹ *Nottage v. Portland*, 35 Or. 539.

² *Turnbull v. Alpena*, 74 Mich. 621; *Matrau v. Tompkins*, 99 Mich. 528; *Shelden v. Marion T'p*, 101 Mich. 256; *Carton v. Board of*

Com'rs (Wyo.), 69 Pac. Rep. 1013.

³ *Logansport v. Humphrey*, 84 Ind. 467; *McWhinney v. Indianapolis*, 98 Ind. 182.

⁴ *Gould v. Board of Com'rs*, 76 Minn. 379. One aggrieved by a tax for widening and grading a street assessed upon his land by a board of aldermen must avail himself by *certiorari* of a defect in the board's proceedings in making and passing orders relative to such tax, and he cannot sue to recover back the tax paid under protest: *Foley v. Haverhill*, 144 Mass. 352. In an action to recover taxes paid under protest, reliance cannot be had upon irregularities that might have been corrected by a

Any further remedy must proceed upon the idea that the tax is void; a mere nullity.¹

timely application to the board of review: *Hinds v. Belvidere T'p*, 107 Mich. 664. One whose property had been purposely assessed at twice the proper amount, paid the tax under compulsion of a warrant, and then sued to recover back half of what he had paid; but it was held that the action would not lie, as his remedy by injunction or review before payment had been adequate: *Belfour v. Portland*, 28 Fed. Rep. 738. One, who pays a personal and poll-tax in a town of which he is not a resident may recover it back, if paid under the threat of a warrant, notwithstanding he was properly taxed for real estate in that town. This would not be regarded as a case of excessive taxation from which the party should appeal; the tax on the personalty and poll being wholly unauthorized: *Preston v. Boston*, 12 Pick. 7. Further, as to the recovery of a town, etc., by non-residents unlawfully taxed within it, see *Hathaway v. Addison*, 48 Me. 440; *Sumner v. Dorchester*, 4 Pick. 361; *Inglee v. Bosworth*, 5 Pick. 498; *Dow v. Sudbury*, 5 Met. 73; *Lee v. Boston*, 2 Gray 484; *Dickinson v. Billings*, 4 Gray 42; *People v. Chenango Supervisors*, 11 N. Y. 563. It has been held that if school taxes are levied unlawfully in a district by vote of the town, they may be recovered back of the town: *Powers v. Sanford*, 39 Me. 183. If a non-resident is taxed on personalty in a town where he does not reside, his right to recover it back cannot be affected by the fact of his having real estate in the town which was omitted from

the list: *Hathaway v. Addison*, 48 Me. 440. Where an inhabitant is wrongfully taxed on property held in trust for him abroad, and has no property taxable to him, he may recover back of the town a tax assessed to and paid by him in respect of the property so held in trust: *Dorr v. Boston*, 6 Gray 131, relying upon *Preston v. Boston*, 12 Pick. 7. When by law the personal estate of corporations is assessed in the shares of the company, but the assessors tax to the corporation both their personal and real estate, and they pay the taxes, they may recover back the tax on the personalty: *Dunnell Manuf. Co. v. Pawtucket*, 7 Gray 277.

¹ *Wright v. Boston*, 9 Cush. 233, 241, per *Shaw*, Ch. J., citing *Preston v. Boston*, 12 Pick. 7; *Boston, etc. Glass Co. v. Boston*, 4 Met. 181; *Howe v. Boston*, 7 Cush. 273; *Lincoln v. Worcester*, 8 Cush. 55, approved in *Rogers v. Greenbush*, 58 Me. 390; *Moore v. Albany*, 98 N. Y. 396; *Wabash, etc. R. Co. v. Johnson*, 108 Ill. 11. And see *Hopkins v. Butte*, 16 Mont. 103. Overvaluation of property is not a ground of action at law for the excess of taxes paid beyond what should have been levied upon a just valuation: *Stanley v. Albany County*, 121 U. S. 535. A petition to the supreme court under the Massachusetts statute to recover the amount of a tax assessed to and paid by a corporation upon the market value of the shares of its capital stock cannot be maintained for a mere over-valuation of the shares: *Boston Manuf. Co. v. Commonwealth*, 144 Mass. 598. It is

Voluntary payments. That a tax or assessment voluntarily paid cannot be recovered back, the authorities generally agree.¹

also held in Massachusetts, that where a party is taxable, but in the assessment are included non-taxable items, action to recover back the tax will not lie: *Oliver v. Lynn*, 130 Mass. 143; *Hicks v. Westport*, 130 Mass. 478. See *Williams v. Saginaw*, 51 Mich. 120. In Michigan city or village taxes paid under protest cannot be recovered back merely because the warrant for their collection had expired and had not been extended: *Gratwick, etc. Co. v. Oscoda*, 97 Mich. 221; *Minor Lumber Co. v. Alpena*, 97 Mich. 499. Nor can taxes paid under protest be recovered from a township merely because of irregularity in the certificates furnished the supervisor of the amount of taxes to be levied on the township: *Shelden v. Marion T'p*, 101 Mich. 256. Nor can drain taxes paid under protest be recovered on the ground of the failure to file in the county clerk's office the record relating to the construction of the drain, as required by the statute: *Matrau v. Tompkins*, 99 Mich. 528. That lots are described in the assessment by wrong numbers is not ground for recovering them back: *Hanson v. Haverhill*, 60 N. H. 218. In New York, if assessments for street improvements are invalid by reason of irregularities appearing on the face of the proceedings, payment of them cannot be recovered back merely because of the invalidity: *Pooley v. Buffalo*, 122 N. Y. 592. In Wisconsin one cannot recover a tax with which his property is justly chargeable, where he neither alleges nor proves any defect or irregularity going to the validity of

the assessment, and affecting the groundwork of the tax: *Wiesmann v. Brighton*, 83 Wis. 550. Where one failed to list property for taxation, and the collector failed to proceed according to the statute in such case, but the assessment was made, and, at the instance of the taxpayer, was afterwards reduced by the collector, it was held that the former could not escape payment because of the collector's irregularity: *Bailey v. Railroad Co.*, 22 Wall. 604. And see, as to waiving irregularities, *Loudon v. East Saginaw*, 41 Mich. 18. For a case where a water company was allowed to recover back from a township the amount, paid under protest, of taxes illegally assessed upon its water-pipes as personal property, see *Monroe Water Co. v. Frenchtown T'p*, 98 Mich. 431.

¹ *Elliott v. Swartwout*, 10 Pet. 137; *Stone v. Bank of Kentucky*, 174 U. S. 409; *Corkle v. Maxwell*, 3 Blatch. 413; *Younger v. Santa Cruz Supervisors*, 68 Cal. 241; *Grumley v. Santa Clara County*, 68 Cal. 575; *Larimer County v. National State Bank*, 11 Colo. 564; *McGehee v. Columbus*, 69 Ga. 581; *Hoke v. Atlanta*, 107 Ga. 416; *Chicago v. Fidelity Bank*, 11 Ill. App. 165; *Mills v. Hendricks County*, 50 Md. 436; *Newcomb v. Davenport*, 86 Iowa 291; *Lindsey v. Boone County*, 92 Iowa 86; *Hawkeye L. & B. Co. v. Marion*, 110 Iowa 468; *Odendahl v. Board of Supervisors*, 112 Iowa 182; *Phillips v. Jefferson County*, 5 Kan. 412; *Wabaunsee County v. Walker*, 8 Kan. 431; *Louisville & N. R. Co. v. Hopkins County*, 87 Ky.

And it is immaterial in such a case that the tax or assessment has been illegally laid, or even that the law under which it was laid was unconstitutional.¹ The principle is an ancient

605; *Louisville & N. R. Co. v. Commonwealth*, 89 Ky. 531; *Smith v. Readfield*, 27 Me. 145; *Smith v. Schroeder*, 15 Minn. 35; *Falvey v. Board of Com'rs*, 76 Minn. 257; *Gould v. Board of Com'rs*, 76 Minn. 379; *Walker v. St. Louis*, 15 Mo. 563; *Christy's Adm'rs v. St. Louis*, 20 Mo. 143; *Douglas v. Kansas City*, 147 Mo. 428; *Turner v. Althus*, 6 Neb. 54; *New York, etc. R. Co. v. Marsh*, 12 N. Y. 308; *Phelps v. New York*, 112 N. Y. 216; *Van Nest v. Sargent County*, 7 N. D. 139; *Hospital v. Philadelphia County*, 24 Pa. St. 229; *Dunnell Manuf. Co. v. Newell*, 15 R. I. 233; *Carton v. Board of Com'rs (Wyo.)*, 69 Pac. Rep. 1013. The rule applies to interest wrongfully extorted: *Maguire v. State Sav. Inst.*, 62 Mo. 344. And also where taxes voluntarily paid are sought to be set off in a proceeding for the sale of land for delinquent taxes: *Otis v. People*, 196 Ill. 542. In *Bushy v. Noland*, 39 Ind. 234, it is said that one who pays without protest is estopped from disputing the legality of the tax. Where a payment is made without protest the fact that a bill is brought by others to have the tax declared void is not enough to entitle the parties paying to recover back: *McCrickart v. Pittsburgh*, 88 Pa. St. 133. If one voluntarily pays a legal tax on lands which he claims to own, he has no claim to recover back when it is decided that he has no title: *Dubuque, etc. R. Co. v. Webster County*, 40 Iowa 16. If one pays a tax on chattels which he had purchased when the tax was not

a lien, his payment is voluntary: *Gaar v. Hurd*, 92 Ill. 315. Where, in a suit to foreclose a tax-deed, the defendant, without being required to do so, pays the fund into court, he will be held concluded by his payment: *Powell v. Supervisors*, 46 Wis. 210. Where taxes levied under a misapprehension of statutory requirements have during nine years been paid without protest, the unexpended surplus of them is not returnable to the taxpayers, no fraud in the making of the assessment being charged: *Manistee Lumber Co. v. Springfield T'p*, 92 Mich. 277. Money voluntarily paid by the holder of a tax-sale certificate for subsequent taxes cannot be recovered back in the absence of fraud or mistake: *Lindsey v. Boone County*, 92 Iowa 86. As to payment of taxes by the receiver of a railroad company pending suit to foreclose a mortgage on the road, see *Norfolk & W. R. Co. v. Smyth County Supervisors*, 87 Va. 521. If the tax has been judicially set aside an action will lie, even though payment was made voluntarily: *Riker v. Jersey City*, 38 N. J. L. 225. See *Peyser v. New York*, 70 N. Y. 497.

¹ *Georgetown Coll. v. District of Columbia*, 4 MacA. 43; *Richardson v. Denver*, 17 Colo. 398; *Thomson v. Morris*, 62 Ga. 538; *Otis v. People*, 196 Ill. 542; *Lange v. Soffell*, 33 Ill. App. 624; *New Orleans Canal, etc. Co. v. New Orleans*, 30 La. An. 1371; *Monticello Dist. Co. v. Baltimore*, 90 Md. 416; *Barrett v. Cambridge*, 10 Allen 48; *Minor Lumber Co. v. Alpena*, 97 Mich.

one in the common law, and is of general application. Every man is supposed¹ to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as a reason why the state should furnish him with legal remedies to recover it back.¹ Especially is this the case when the officer

499; *Taylor v. Board of Health*, 31 Pa. St. 73; *Milwaukee v. Whitefish*, 106 Wis. 25. Money paid to secure a license, issued on the licensee's petition, is voluntarily paid, and cannot be recovered back even though no power existed to require it: *Mays v. Cincinnati*, 1 Ohio 268, citing *Brisbane v. Dacres*, 5 Taunt. 143; *Elliott v. Swartwout*, 10 Pet. 137; *Clark v. Dutcher*, 9 Cow. 674; *Robinson v. Charleston*, 4 Rich. 317; *Smith v. Readfield*, 27 Me. 145. To the same effect are *Helena v. Dwyer*, 64 Ark. 424; *Tatum v. Trenton*, 85 Ga. 468; *Lingonier v. Ackerman*, 46 Ind. 552. Money paid to a city as a license fee is recoverable to the extent that it exceeded the amount which the city was entitled to exact: *Board of Council v. Renfro (Ky.)*, 58 S. W. Rep. 795. The mere fact that lands taxed were unpatented is no ground for recovering back: *Welton v. Merrick County*, 16 Neb. 83. And see *Foster v. Pierce County*, 15 Neb. 48; *Bates v. York County*, 15 Neb. 284. A penalty wrongfully added to the tax but paid without protest cannot be recovered: *Russell v. New Haven*, 51 Conn. 259.

¹ Ignorance or mistake of law by one who voluntarily pays a tax illegally assessed furnishes no ground of recovery: *Richardson v. Denver*, 17 Colo. 398; *Tatum v. Trenton*, 85 Ga. 468; *McWhinney v. Logansport*, 132 Ind. 9; *Kraft v. Keokuk*, 14 Iowa 86; *Espy v. Fort*

Madison, 14 Iowa 226; *Gould v. Board of Com'rs*, 76 Minn. 379; *Pooley v. Buffalo*, 124 N. Y. 206; *Bristol v. Morganton Com'rs*, 125 N. C. 365; *Curtin v. Viroqua*, 67 Wis. 314. And see *Lester v. Baltimore*, 29 Md. 415. The general rule is that a payment voluntarily made cannot be recovered back because of the person's having been in error as to the right to require it: *Tupelo v. Beard*, 56 Miss. 532. So where taxes were voluntarily paid to a city upon property which had been embraced in an unconstitutional extension of the city's limits: *Couch v. Kansas City*, 127 Mo. 436. See *Jackson v. Atlanta*, 61 Ga. 228. Where an ordinance directing a local improvement is on its face illegal and void because violating the statutory power conferred upon the common council, the uncoerced payment of an assessment for the expense incurred is a mistake of law, and cannot be recovered back: *Phelps v. New York*, 112 N. Y. 216. In Kentucky it is held that one who pays an illegal tax under the belief that it is valid, and in response to a demand, and threat of compulsory collection, may recover it back upon discovering his mistake: *Torbitt v. Louisville (Ky.)*, 4 S. W. Rep. 345, citing *Louisville v. Anderson*, 79 Ky. 334. In *Newport v. Ringo's Ex'x*, 87 Ky. 635, it is said: "If money be paid through a clear mistake of law or fact essentially

receiving the money, who is chargeable with no more knowledge of the law than the party making payment, is not put on his guard by any warning or protest, and the money is paid over to the use of the public in apparent acquiescence in the justice of the exaction. Mistake of fact can scarcely exist in such a case except in connection with negligence; as the illegalities which render such a demand a nullity must appear from the records, and the taxpayer is just as much bound to inform himself what the records show, or do not show, as are the public authorities.¹ The rule of law is a rule of sound pub-

affecting the rights of the parties, and which in law or conscience was not payable, and which should not be retained by the party receiving it, it may be recovered. Especially should this be the rule as to illegal taxation. The taxpayer has no voice in the imposition of the burden. He has the right to assume that the taxing power has been lawfully exercised. He should not be required to know more than those in authority over him, nor should he suffer loss by complying with what he *bona fide* believes to be his duty as a good citizen. Upon the contrary, he should be prompted to its ready performance by refunding to him any illegal exaction, paid by him in ignorance of its illegality; and certainly in such a case if he be subjected to a penalty for non-payment, his compliance under a belief of its legality, and without awaiting a resort to judicial proceedings, should not be regarded in law as so far voluntary as to affect his right of recovery." And these words are found in *Louisville & N. R. Co. v. Commonwealth*, 89 Ky. 531: "A distinction is to be taken between cases where a collection can be enforced summarily, and those where resort must be

had to the courts. In the one case, the taxpayer must submit to a levy upon his property or pay the money; in the other, he has the opportunity to contest the demand in court, and if he does not choose to do so, and voluntarily pays it, he is remediless." And see *Underwood v. Brockman*, 4 Dana 309; *Ray v. Bank of Kentucky*, 3 B. Monr. 510; *Louisville v. Powell*, 2 Met. (Ky.) 226.

¹ See, as to recovering back taxes paid through mistake or ignorance of fact, *San Diego L. & T. Co. v. La Presa School Dist.*, 122 Cal. 98; *Indianapolis v. Patterson*, 112 Ind. 344; *Mathews v. Kansas*, 80 Mo. 231; *Wilmington v. Ricaud*, 90 Fed. Rep. 214, 32 C. C. A. 580; *Tripler v. New York*, 125 N. Y. 617; *Walser v. Board of Education*, 160 Ill. 272. If one pays taxes on the county auditor's statement of the amount adjudged to be due, as provided by the statute, his payment cannot be regarded as voluntary, or as made without any mistake of fact, so as to preclude recovering the amount of the excessive payment: *Wheeler v. Board of Com'rs (Minn.)*, 91 N. W. Rep. 890. It was held in *Woolley v. Staley*, 39 Ohio St. 354, that if payment was made under a mistake of fact that

lie policy also; it is a rule of quiet as well as of good faith, and precludes the courts being occupied in undoing the arrangements of parties which they have voluntarily made, and into which they have not been drawn by fraud or accident, or by any excusable ignorance of their legal rights and liabilities.¹

All payments are supposed to be voluntary until the contrary is made to appear.² Nor is the mere fact that a tax is paid unwillingly, or with complaint, of any legal importance, but there must be in the case some degree of compulsion to which the taxpayer submits at the time but with notification of some sort equivalent to reservation of rights.³ It has

a tax appeared on the list when it did not, the sum paid could be recovered back. And in *Indianapolis v. McAvoy*, 86 Ind. 587, it was held that one could recover a city tax paid under the erroneous belief that the land on which the tax was laid was within the city, although it might be otherwise if he was negligent in ascertaining the facts. But it was ruled in *Jackson v. Atlanta*, 61 Ga. 228, that if, after one has for several years voluntarily paid city taxes upon lands supposed to be within the city, it turns out that they are not, he will have no legal claim to reimbursement. And see *Couch v. Kansas City*, 127 Mo. 436.

¹ *San Diego L. & T. Co. v. La Presa School Dist.*, 122 Cal. 98.

² See *Northwestern Packet Co. v. St. Louis*, 4 Dill. 10. The mere fact that the collector might have enforced payment will not make a payment involuntary when he was taking no steps to collect and making no threats: *Wilson v. Pelton*, 40 Ohio St. 306. So a tax paid merely because the collector holds a warrant is paid voluntarily, and may not be recovered back: *Dunnell Manuf. Co. v. Newell*, 15 R. I. 223. And an illegal license tax paid is not recoverable

where there is no evidence of threats or notification to pay: *Douglas v. Kansas City*, 147 Mo. 428.

³ *Jackson v. Newman*, 39 Miss. 385. See *Preston v. Boston*, 12 Pick. 7; *Tuttle v. Everett*, 51 Miss. 27; *Clafin v. McDonough*, 33 Mo. 412; *Douglas v. Kansas City*, 147 Mo. 428; *Dixon County v. Bradshear*, 38 Neb. 389; *Vanderbeck v. Rochester*, 122 N. Y. 285; *Dunnell Manuf. Co. v. Newell*, 15 R. I. 233; *Meecham v. Newport*, 70 Vt. 67. Money paid to a tax-collector in satisfaction of an illegal license tax, in order to avoid an action or prosecution to which the invalidity of the statute would be a defense, is a voluntary payment which cannot be recovered back: *Maxwell v. San Luis Obispo County*, 71 Cal. 466. The fact that an assessment was paid in order to enable the owner to complete his contract of sale does not amount to coercion in law or fact, and does not warrant a recovery back: *Tripler v. New York*, 125 N. Y. 617. And if the payment was in fact made to effectuate a sale, the owner cannot recover it as having been involuntarily made to prevent the accruing of interest on the assessment: *Ibid.* In

been said in one case that "taxes illegally recovered may always be recovered back if the collector understands from the payer that the tax is regarded as illegal, and that suit will be instituted to compel the refunding;"¹ but it has been repeatedly held that a mere protest, when payment was not made to save arrest or the seizure or sale of goods, or in submission to process that might immediately have been enforced, would not relieve the payment of its presumed voluntary character.² In some cases it is held that a payment made only to release lands from the lien of a tax, or to prevent a sale of lands, or to redeem lands from a sale actually made, will not be held a payment under compulsion, and the party paying cannot reclaim it;³ but this is not universally assented to;⁴ and it seems

Michigan it is held that the payment, under protest, of illegal taxes in order that the owner's deed to a prospective purchaser may be recorded, is not under duress although otherwise the chance to sell would be lost: *Weston v. Luce County*, 102 Mich. 528; *Gage v. Saginaw* (Mich.), 84 N. W. Rep. 1100. *Contra*, in Minnesota: *State v. Nelson*, 41 Minn. 25. Payment of an assessment in order to obtain a loan on the property, and not under coercion, held not recoverable back: *Redmond v. New York*, 125 N. Y. 632. As to the

voluntary or involuntary character of payment of amount required by statute subsequently declared unconstitutional to be paid as condition precedent to administration of estate, see *Mearkle v. Board of County Com'rs*, 44 Minn. 546; *De Graff v. Byles*, 46 Minn. 319.

¹ *Chase*, Ch. J., in *Erschine v. Van Arsdale*, 15 Wall. 75, 77. See *Raisler v. Athens*, 66 Ala. 194.

² *Lamborn v. County Com'rs*, 97 U. S. 181; *Railroad Co. v. Com'rs*, 98 U. S. 541; *Dear v. Varnum*, 80 Cal. 86; *Americus Bank v. Americus*, 68 N. Y. 119; *Conkling v.*

³ *De Baker v. Carillo*, 52 Cal. 473; citing *Bicknall v. Story*, 46 Cal. 595; *Mills v. Austin*, 53 Cal. 152; *Cooper v. Chamberlain*, 78 Cal. 450; *Phelan v. San Francisco*, 120 Cal. 1; *Stover v. Mitchell*, 45 Ill. 213; *Otis v. People*, 196 Ill. 542; *Detroit v. Martin*, 34 Mich. 171; *Shane v. St. Paul*, 26 Minn. 543; *Russell v. Mayor*, 35 Hun 348; *Tripler v. New York*, 125 N. Y. 617.

⁴ See *Brown v. Mays*, 120 N. Y. 357. Under a statute making a street-superintendent's deed *prima facie* evidence of the regularity of

proceedings to open a street and conclusive evidence of the necessity of taking the land and of the correctness of the compensation awarded therefor, the payment of a void assessment under protest to prevent a sale and a clouding of title is not voluntary so as to preclude recovery: *Gill v. Oakland*, 124 Cal. 335. In *Seeley v. Westport*, 47 Conn. 294, explaining *Sheldon v. School District*, 24 Conn. 88, it was held that a payment of a tax on realty might be recovered back as well as one on personalty.

reasonable that the rule should be restricted to cases in which, if sale were made, fatal defects would appear on the face of the proceedings. A party ought not to be exposed to any more risks of loss in relieving his lands of an apparent cloud upon title than in protecting his goods against an illegal sale.

When a voluntary payment is spoken of, the qualifying word is not used in its ordinary sense, and many payments are held to be voluntary which are made unwillingly and only as a choice of evils or of risks.¹ Thus, a payment has been held to be voluntary which the owner made to save his property from being sold, as he supposed, when the collector was actually assuming to proceed to sale, but with an authority void on its face, and without possession or control of the property.² A like ruling has been made where the officer threatened to sell property for a tax not then delinquent; having at the time no power to carry out his threat.³ So where a court without authority made an order for the payment of a tax, and payment was made accordingly — the party under such circumstances being under no legal compulsion — the payment was held voluntary.⁴ So where one on the day fixed for the sale of his

Springfield, 132 Ill. 420; *Jenks v. Lima*, 17 Ind. 326; *Patterson v. Cox*, 25 Ind. 261; *Durham v. Com'rs*, 95 Ind. 182; *Muscatine v. Packet Co.*, 45 Iowa 185; *Commissioners v. Walker*, 8 Kan. 431; *Forbes v. Appleton*, 5 Cush. 115; *White v. Millbrook T'p*, 60 Mich. 532; *Hopkins v. Butte*, 16 Mont. 103; *Wilcox v. New York*, 53 N. Y. Super. Ct. 436; *Whitbeck v. Minch*, 48 Ohio St. 210; *Hospital v. Philadelphia County*, 24 Pa. St. 229; *Peebles v. Pittsburgh*, 101 Pa. St. 304; *Carton v. Board of Com'rs (Wyo.)*, 69 Pac. Rep. 1013. Payment by the owner upon purchase at tax-sale held voluntary though he required the treasurer to give a receipt reciting that the money was "paid under protest after levy:" *Loud, etc. Co. v. Vienna T'p*, 120 Mich. 382, citing, as a

similar case, *Gachet v. McCall*, 50 Ala. 307.

¹ *Canfield Salt, etc. Co. v. Manistee T'p*, 100 Mich. 466, 469.

² *Sonoma County Tax-Case*, 13 Fed. Rep. 789. See *Minor Lumber Co. v. Alpena*, 97 Mich. 499; *Canfield Salt, etc. Co. v. Manistee T'p*, 100 Mich. 466; *Union Bank v. New York*, 51 Barb. 159; *Smyth v. New York*, 58 N. Y. Super. Ct. 357, 11 N. Y. Supp. 583; *Sowles v. Soule*, 59 Vt. 131.

³ *Bank of Santa Rosa v. Chalfant*, 52 Cal. 170; *Merrill v. Austin*, 53 Cal. 379; *Bank of Woodland v. Webber*, 52 Cal. 73. It would be otherwise if payment were made after delinquency: *Smith v. Farrelly*, 52 Cal. 77; *De Fremery v. Austin*, 53 Cal. 380.

⁴ *Drake v. Shurtliff*, 24 Hun 422; *Bailey v. Buell*, 50 N. Y. 662.

property for the illegal tax proposed to make payment on the next day if the sale should be postponed, and postponement was had and payment made as proposed, this was held a voluntary payment.¹ And it has been said in some cases, that when it is sought to recover back a payment as having been made under compulsion, it should be made to appear that payment was made to release either person or property from the power of the officer.² And this may be said to express the general sense of the authorities.³

A state supreme court sustained a tax and a party then paid it and took a tax certificate. The federal supreme court afterwards held the tax void. Held, that the payment must be deemed voluntary: *Lamborn v. County Com'rs*, 97 U. S. 181; *Commissioners v. Land Co.*, 23 Kan. 196.

¹ *Gatchett v. McCall*, 50 Ala. 307.

² *Brazil v. Kress*, 55 Ind. 14; *Edinburg v. Hackney*, 54 Ind. 83; *Baker v. Big Rapids*, 65 Mich. 76; *Tripler v. New York*, 125 N. Y. 617. Where a town offers a discount to those who make payment promptly, a payment made to obtain this discount has been held to be voluntary, though made under protest: *Lee v. Templeton*, 13 Gray 476.

³ Upon the right to maintain this action in general, see *Goddard v. Seymour*, 30 Conn. 394; *Hubbard v. Brainard*, 35 Conn. 563; *Callaway v. Milledgeville*, 48 Ga. 309; *Wilkey v. Pekin*, 19 Ill. 160; *Richards v. Stogsdell*, 21 Ind. 74; *Allentown v. Saeger*, 20 Pa. St. 421; *Henry v. Chester*, 15 Vt. 460; *Allen v. Burlington*, 45 Vt. 202. The question what constitutes a voluntary payment was quite fully discussed, and the American authorities cited, in *Baker v. Cincinnati*, 11 Ohio St. 534, and *Taylor v. State*, 31 Pa.

St. 73. The Ohio case quotes particularly, *Fullam v. Down*, 6 Esp. 26; *Valpy v. Manly*, 1 C. B. 594; *Parker v. Great Western Ry. Co.*, 7 M. & G. 253; *Morgan v. Palmer*, 2 B. & C. 729. In *Carleton v. Ashburnham*, 102 Mass. 348, the maxim that where two acts are done at the same time, the one shall take effect first which ought in strictness to have been done first, in order to give it effect (*Claffin v. Thayer*, 13 Gray 459), was applied to a simultaneous payment of tax and delivery of a protest against its exaction. In *Muscantine v. Packet Co.*, 45 Iowa 185, it is said that a payment made under protest cannot be recovered back unless there was power to enforce payment in some other way than by suit at law. A payment is voluntary if made before any demand, and when nothing has been done except to charge the property upon the list to the taxpayer, though the officer has a warrant in his hands which he has not attempted or threatened to serve: *Railroad Co. v. Com'rs*, 98 U. S. 541. So is payment made where the tax could only be enforced in judicial proceedings in which the party would have a right to be heard, but which are not yet taken: *Oceanic, etc. Co. v. Tappan*, 16 Blatch. 296.

Statutes in some states have changed the rule somewhat, and have allowed a recovery in all cases of illegal tax, provided that at the time of payment formal protest was made as the statute prescribes.¹ In respect to such statutes it is only nec-

¹ In Massachusetts, under the provision that a tax may be recovered back if paid by the plaintiff after "a protest by him in writing," any person on whom a collector makes a demand for payment of a tax included in his warrant, on the ground that he is personally liable to pay it, or whose property the collector is proceeding to sell on the ground that it is liable for the tax, may pay the tax under written protest and sue to recover back the amount paid, instead of resisting the collector or resorting to other remedies: *McGee v. Salem*, 149 Mass. 238. In Michigan it has been held that the provision for the recovery of illegal taxes paid to the township treasurer under protest, does not authorize the recovery of taxes so paid to the county treasurer, after the land has been returned for unpaid taxes: *Weston v. Luce County*, 102 Mich. 528. Nor does the provision of the general tax-law of Michigan concerning payment of taxes under protest, apply to assessments for local improvements: *Thompson v. Detroit*, 114 Mich. 502. The Michigan statute providing that one may pay an illegal tax and recover back from the township does not authorize the recovery by a stranger to a tax, of money paid to prevent a seizure of his property to satisfy such tax: *Canfield Salt & L. Co. v. Manistee T'p*, 100 Mich. 466. It was said in *White v. Millbrook*, 60 Mich. 532, that it is not the protest which gives the taxpayer his

right of action to recover back the amount paid, but the illegality of the tax assessed. The protest only determines the time from which the amount may be recovered for causes of illegality mentioned in the protest. In *Gage v. Saginaw* (Mich.), 87 N. W. Rep. 1027, it is held that the provision for payment under protest and suit authorizes one, in order to remove a cloud from his title, and thereby facilitate a sale, to pay, voluntarily, contested taxes under protest and sue for the recovery of them. The decree of the circuit court adjudging the tax to be void, and reciting the presence of counsel, is sufficient proof of invalidity. In Nebraska, the general rule that taxes voluntarily paid cannot be recovered back has been modified by statute as to taxes collected for an illegal or unauthorized purpose: *Custer County v. Chicago, B. & Q. R. Co.* (Neb.), 87 N. W. Rep. 341; *Dakota County v. Chicago, St. P., M. & O. R. Co.* (Neb.), 88 N. W. Rep. 663. Taxes levied in excess of the constitutional limit are for such a purpose: *Chase County v. Chicago, B. & Q. R. Co.*, 58 Neb. 274; *Dakota County v. Chicago, St. P., M. & O. R. Co.*, *supra*. It was held in *Caldwell v. Lincoln*, 19 Neb. 569, that an occupation tax exacted under a void ordinance may be recovered back. So in *Chapel v. Franklin County*, 58 Neb. 544, it was decided that one who has paid personal taxes under protest cannot sue to recover the moneys paid on the ground that the levy was

essary to say that a party relying upon them must be careful to bring his case within their provisions.¹ The protest will not be effective unless made within the time required by the statute.² Where the statute requires a written notice of protest, an oral protest, with an entry by the receiving clerk in his book that the tax was paid under protest, is not sufficient.³ Generally the protest is required to specify the grounds of invalidity relied upon, and grounds not specified will not be considered.⁴ If a suit is given only in cases where payment was

made on an excessive assessment. In Rhode Island an illegal tax paid under protest may be recovered back: *Dunnell Manuf. Co. v. Newell*, 15 R. I. 233. Under the South Carolina statute the right to sue to recover taxes paid under protest accrues only to him in whose name the taxes are listed and does not extend to one who afterwards purchases the property on which the lien exists: *Deto Gold Mining Co. v. Smith*, 49 S. C. 188. Under the Utah statute as soon as one pays the unlawful tax under protest he acquires a right to sue; and in such suit it is not necessary to show a payment by duress: *Centennial Eureka Mining Co. v. Juab County*, 22 Utah 395.

¹ *Bankers' Life Assoc. v. Douglas County Com'rs*, 61 Neb. 202.

² *Warren v. Russell*, 129 Cal. 381.

³ *Knowles v. Boston*, 129 Mass. 551. But it is sufficient for the taxpayer to write his protest across the face of the tax-bill, sign it and deliver it to the collector: *Borland v. Boston*, 132 Mass. 89.

⁴ *Meek v. McClure*, 49 Cal. 623; *Peninsular Iron, etc. Co. v. Crystal Falls T'p*, 60 Mich. 510; *Hinds v. Belvidere T'p*, 107 Mich. 664; *Aurora Iron Mining Co. v. Ironwood*, 119 Mich. 325; *Davis v. Otoe County*, 55 Neb. 677; *Bankers'*

Life Assoc. v. Douglas County Com'rs, 61 Neb. 202. See *De Fremery v. Austin*, 53 Cal. 380. But it is held in California that this is to put the officer upon inquiry, and if he is proceeding to enforce the tax against property outside of his district, the protest need not specify grounds: *Mason v. Johnson*, 51 Cal. 612. So if a county collector is assuming to act in a district formed for a special taxing purpose, though within the county: *Smith v. Farrelly*, 52 Cal. 77. In Michigan, where a tax is paid under protest on a threat of levy, the taxpayer, in a suit to recover it, is not limited to the reasons stated in his protest: *Cox v. Welcher*, 68 Mich. 263; *Woodmere Cemetery Assoc. v. Springwells T'p (Mich.)*, 90 N. W. Rep. 277. Where it is claimed that the entire tax proceeding is void and without jurisdiction, "Paid under protest, to protect property from being sold, and on account of tax being illegal," is sufficiently specific: *Whitney v. Port Huron*, 88 Mich. 268. Further as to sufficiency of protest, see *Mackay v. San Francisco*, 128 Cal. 678; *Peninsular Iron, etc. Co. v. Crystal Falls*, 60 Mich. 79; *Barnard v. White Cloud*, 108 Mich. 508; *Omaha v. Kountz*, 25 Nev. 60; *Centennial Eureka Mining Co. v. Juab County*, 22 Utah 395. In

made after notice of sale by advertisement and posting, a written notice to the taxpayer that sale will be made unless he pays is not sufficient notice of sale.¹

*Compulsory payments.*² A payment made to relieve the person from arrest or the goods from seizure is a payment on compulsion;³ and so is the payment made to prevent a seizure when it is threatened.⁴ So with still greater reason is the payment which the officer secures by making sale of goods seized.⁵ But it is not necessary for the taxpayer to wait for his goods to be sold or even to be seized. If the officer calls upon the person taxed, and "demands a sum of money under a warrant

Rhode Island it is held that the protest accompanying a payment of taxes need not specify wherein they are illegal: *Rumford Chemical Works v. Ray*, 19 R. I. 456.

¹ *Knowles v. Boston*, 129 Mass. 551.

² In an action for the recovery of money paid for taxes illegally assessed the law is more liberal as to what constitutes duress than in other cases: *Creamer v. Bremen*, 91 Me. 508.

³ *Briggs v. Lewiston*, 29 Me. 472; *Babcock v. Beaver Creek T'p*, 65 Mich. 479; *Lindsay v. Allen*, 19 R. I. 721. Where a county auditor makes an illegal assessment, and the taxes are collected by levy and execution, the person injured can collect from the county the amount so illegally collected: *Hennel v. Board of Com'rs*, 132 Ind. 32. A license tax voluntarily paid is not recoverable from the city even though the payment of it was made to secure, by procuring a license, the dismissal of a warrant of arrest for what was not in fact a violation of the ordinance laying the tax: *Bean v. Middlesboro (Ky.)*, 57 S. W. Rep. 478.

⁴ *Helena v. Dwyer*, 64 Ark. 424; *Mills' Guardian v. Hopkinsville*

(Ky.), 11 S. W. Rep. 776; *Creamer v. Bremen*, 91 Me. 508; *Minor Lumber Co. v. Alpena*, 97 Mich. 499; *St. Anthony & D. Elevator Co. v. Bottineau County*, 9 N. D. 346; *Grimm v. School Dist.*, 57 Pa. St. 433, citing *Henry v. Horstick*, 9 Watts 414, *Caldwell v. Moore*, 11 Pa. St. 60, and *Allentown v. Saeger*, 20 Pa. St. 421; *Shaw v. Allegheny*, 115 Pa. St. 46; *Kelley v. Rhoads*, 7 Wyo. 237. And see *Guy v. Washburn*, 23 Cal. 111; *Vicksburg v. Butler*, 56 Miss. 72. A payment of taxes is not made voluntary by the fact that the taxpayer, when a levy is threatened, points out his property upon which a levy can be made: *Roedel v. White Cloud*, 108 Mich. 506. Nor is a payment voluntary where the payer lays down money, but forbids the collector to take it: *Bellinger v. Gray*, 51 N. Y. 610. And see *Greenbaum v. King*, 4 Kan. 332; *Stephan v. Daniels*, 27 Ohio St. 527. Where, to prevent a sale for taxes, one pays a tax-collector more than his fee, the payment is not voluntary: *Benton v. Goodale*, 67 N. H. 498.

⁵ *Hennel v. Board of Com'rs*, 132 Ind. 32; *Hurley v. Texas*, 20 Wis. 634.

directing him to enforce it, the party of whom he demands it may fairly assume that if he seeks to act under the warrant at all, he will make it effectual. The demand itself is equivalent to a service of the writ on the person. Any payment is to be regarded as involuntary which is made under a claim involving the use of force as an alternative; as the party of whom it is demanded cannot be compelled or expected to await actual force, and cannot be held to expect that an officer will desist after making a demand. The exhibition of a warrant directing forcible proceedings, and the receipt of money thereon, will be in such case equivalent to actual compulsion."¹ As is said in another case, a person is not bound to wait until his property is actually taken by a legal process; one which he cannot properly resist; and cost made before he pays a claim upon it. It is sufficient if the circumstances are such as fairly lead to the conclusion that the waste and expense can be avoided only by payment.² So payment of a water tax under

¹ *Campbell, J.*, in *Atwell v. Zeff*, 26 Mich. 118, citing *Boston, etc. Glass Co. v. Boston*, 4 Met. 181. And see *Amesbury, etc. Manuf. Co. v. Amesbury*, 17 Mass. 461; *Preston v. Boston*, 12 Pick. 7; *George v. School District*, 6 Met. 497; *Joyner v. School District*, 3 Cush. 567; *Lincoln v. Worcester*, 8 Cush. 55; *Babcock v. Beaver Creek T'p*, 64 Mich. 601. One who pays, under protest, an illegal tax to the town treasurer, authorized to collect taxes, after receiving notice from the treasurer that if the tax is not paid by a day named its collection will be enforced by warrant, is to be treated as having been paid under compulsion, and entitled to recover the demand. He need not have waited until near the end of the time allowed. And no material distinction is recognized between a case in which a discount is allowed upon a tax if paid before a day named, and one in which the tax

is to be increased by a penalty if not paid: *Stowe v. Stowe*, 70 Vt. 609. Where a demand for a tax is an essential prerequisite to a seizure, and payment is made before demand, such payment is not compulsory so that it can be recovered back: *Conkling v. Springfield*, 19 Ill. App. 167.

² *Howard v. Augusta*, 74 Me. 79; *Raleigh v. Salt Lake City*, 17 Utah 130. To the same effect are *Ruggles v. Fond du Lac*, 53 Wis. 436; *Parcher v. Marathon County*, 52 Wis. 388; *Neuman v. La Crosse*, 94 Wis. 103. Where illegal taxes apparently constitute a lien upon corporate stock, payment of them necessary to relieve from such lien is not voluntary so as to preclude an action to recover them back: *Ætna Ins. Co. v. New York*, 153 N. Y. 331. Nor can payment by a bank of illegal taxes on its stock without express authority from the owners, be regarded as a voluntary payment by the latter

threat of cutting off the water is a payment under compulsion.¹ So payment, under protest, by a foreign corporation, of a license tax claimed to be unconstitutional, will not be deemed voluntary when necessary to protect property and continue

so as to preclude such action: *Ibid.* *Contra*, as to the latter point, *Baltimore v. Hussey*, 67 Md. 112. Payment of an assessment under protest after the return of a warrant and the adoption by the village trustees for the advertisement and sale of delinquent lands, is under such coercion as will sustain a recovery on the assessment's being declared illegal: *Vaughn v. Port Chester*, 135 N. Y. 460. Payment of an assessment for a street improvement, under protest and after demand, being necessary to relieve the property from a *prima facie* lien, is recoverable as involuntary, though proceedings to sell had not been instituted: *Thompson v. Detroit*, 114 Mich. 502. Redemption of tax certificates under protest to prevent them from ripening into a deed, held not a voluntary payment so as to prevent recovery thereof: *Whittaker v. Deadwood*, 12 S. D. 608. Payment of money necessary to redeem land sold on foreclosure of an assessment lien for street improvements is not voluntary: *Keehn v. McGillicuddy*, 19 Ind. App. 427. In *Galveston Gas Co. v. Galveston County*, 54 Tex. 287, it is said: "The rule heretofore enforced in this court in regard to the recovery back of taxes exacted is perhaps more liberal than that sanctioned by the current of authority generally. See *Marshall v. Snediker*, 25 Tex. 471; *Baker v. Panola County*, 30 Tex. 86; *Galveston County v. Gorham*,

49 Tex. 301. These cases recognize that a payment may be compulsory, although not made to relieve the person or goods from seizure or detention, actual or threatened, if made under circumstances creating a moral pressure of 'equal influence in perverting the free will.' *Galveston County v. Gorham*, *supra*. Where made to avoid the danger of a heavy penalty, which, however, could only have been enforced by a criminal prosecution, in which the party would have lost his opportunity to set up the illegality of the tax as a defense, the recovery back was allowed: 25 Tex. and 30 Tex. *supra*. On the same principle, we think that the plaintiff here was not compelled to risk the heavy loss which might have resulted from the sale, although his possession could only have been disturbed by a suit in which he would have had his day in court. The moral pressure was sufficiently great, the necessity sufficiently immediate and urgent, to remove the payment illegally made under protest from the class of voluntary payments." And see *Galveston v. Sydnor*, 39 Tex. 236. It is said in a Kentucky case that if "distrain or a summary mode of collection be adopted, then the payment will not be regarded as voluntary:" *Louisville & N. R. Co. v. Commonwealth*, 89 Ky. 531.

¹ *Westlake v. St. Louis*, 77 Mo. 47.

business in the state.¹ And it is held in some cases that a payment is to be regarded as compulsory, even though it is not shown that the collector had a warrant, if it is actually made to avoid an expected levy on property which would have followed in due course of law.²

Action for recovery. The proper action against a municipality in these cases is *assumpsit* for money had and received,³ the liability not attaching until the money is paid over,⁴ and being then based upon the receipt of the money, and not upon the illegalities which preceded it.⁵ As the cause of action accrues at the time of the payment, the statute of limitations begins to run from that time, even though the illegality may not then have been known.⁶

¹ *Scottish Union, etc. Ins. Co. v. Herriott*, 109 Iowa 606. Payment by an express company of an illegal tax on its gross receipts from inter-state business, under protest, and with notice of an intention to bring action to recover the amount, is an involuntary payment when made to avoid the statutory penalties: *Ratterman v. American Exp. Co.*, 49 Ohio St. 608. If a liquor tax, the payment of which is a condition to doing business, is made under an unconstitutional law, with protest, it may be recovered back: *Catoir v. Waterman*, 38 Ohio St. 319, citing *Baker v. Cincinnati*, 11 Ohio St. 534; *Stephan v. Daniels*, 27 Ohio St. 527.

² *Kansas, etc. R. Co. v. Wyandotte County*, 16 Kan. 587; *Peyser v. New York*, 70 N. Y. 497; *Raleigh v. Salt Lake City*, 17 Utah 130; *Babcock v. Granville*, 44 Vt. 325.

³ *Raisler v. Athens*, 66 Ala. 194; *Garland County v. Gaines*, 47 Ark. 558; *Grand Rapids v. Blakeley*, 40 Mich. 367. See *Diefenthaler v. Mayor*, 111 N. Y. 331. City held

not liable in damages for having in good faith claimed taxes, and a lien and privilege on the property therefor, and for having sought to collect the same, though the court holds them to have been prescribed: *Leeds & Co. v. Hardy*, 44 La. An. 556.

⁴ If the tax is charged to the collector in a general settlement with him, this is equivalent to a payment into the treasury: *County Com'rs v. Parker*, 7 Minn. 267; *Slack v. Norwich*, 32 Vt. 818; *Babcock v. Granville*, 44 Vt. 325. It is no ground for recovering back a tax that it was collected by one who was not collector *de jure*, where he was such *de facto*: *Williams v. School Dist.*, 21 Pick. 75.

⁵ *Raisler v. Athens*, 66 Ala. 194; *Grand Rapids v. Blakeley*, 40 Mich. 367.

⁶ *Garland County v. Gaines*, 47 Ark. 558; *Beecher v. Clay County*, 52 Iowa 140; *Scott v. Chickasaw County*, 53 Iowa 47; *Diefenthaler v. Mayor*, 111 N. Y. 331; *Trimmer v. Rochester*, 134 N. Y. 76; *Centennial Eureka Mining Co. v. Juab*

In South Carolina an action to recover back an illegal tax paid under protest must be brought by him in whose name the taxes are listed, not by one who afterwards purchases the property affected with the lien for them.¹ A suit cannot be maintained by one taxpayer on behalf of himself and others, to recover back taxes alleged to have been illegally assessed, on the ground that the taxes were involuntarily paid by each; each must sue on his own behalf.² But in Kentucky the statute permits this.³

A demand is not necessary, before bringing suit to recover back illegal taxes, unless made so by statute.⁴ In the margin-

County, 22 Utah 395. It was held in Magnolia Dist. T'p v. Boyer Indep. Dist., that where, in an action to recover taxes wrongfully collected by the defendant for fifteen years, fraudulent concealment of the cause of action is not alleged, part of the claim is barred by the statute, but the rest may be recovered. In Babcock v. Beaver Creek T'p, 65 Mich. 479, it was decided that the limitation of thirty days prescribed by the Michigan statute for suits to recover taxes paid under protest, has no application where the money paid was not paid upon any assessment made against the plaintiff or his property. And it was held in Little Rock & M. R. Co. v. Williams, 101 Tenn. 146, that the statute providing that taxes due the state must be paid, and, if deemed illegal or unjust, suit to recover them back must be brought within thirty days, has no application to taxes paid to a city or county. See Merriam v. Otoe County, 15 Neb. 408, for recovery against a county under a statute when a suit would otherwise be barred by lapse of time.

¹ De Soto Gold Mining Co. v. Smith, 49 S. C. 188.

² Jackson T'p Trustees v. Thoman, 51 Ohio St. 285.

³ Whaley v. Commonwealth (Ky.), 61 S. W. Rep. 35.

⁴ Arapahoe County v. Cutter, 3 Colo. 349; Look v. Industry, 51 Me. 375; Chicago, B. & Q. R. Co. v. Nemaha County, 50 Neb. 393; Bruecher v. Port Chester, 101 N. Y. 240; Boynton v. Faulk County, 15 S. D. (64 N. W. Rep. 518). See Pierce v. Benjamin, 14 Pick. 356. It was held in Bradley v. Eau Claire, 56 Wis. 168, that the action would lie against a city without first presenting the same to the city council, though the charter forbids actions on any "claim or demand," until after it has been so presented. And compare Wright v. Merrimack, 52 Wis. 466; Kellogg v. Supervisors, 42 Wis. 97. A contrary ruling has been made in Michigan: Mead v. Lansing, 56 Mich. 600. See Bibbins v. Clark, 90 Iowa 230. Under a charter provision that it shall be a sufficient defense in an action against the city that reasonable time for investigation was not allowed, a suit brought March 29th upon a claim presented to the city council March 16th, the next regular meeting being held April 5th, was held premature: Mason v. Muskegon, 111 Mich. 687. A statute declaring that repayment of invalid taxes may be demanded

are cited several cases which bear upon the requisites of the declaration, petition, or complaint in this action.¹ The recovery must be limited to the money received; while in an action of trespass against the assessors, or trespass or trover against the collector, the plaintiff might recover such actual damages as he could show he had sustained.² If only part of the tax was illegal, the recovery will be limited to that part, if capable of being distinguished.³ Interest is recoverable only when expressly allowed by statute,⁴ and then usually from time of payment if paid under protest, or from time of demand if paid without protest.⁵ It has been held that costs

within thirty days after payment is mandatory, and no action can be maintained without making the demand in the required time: *Hatwood v. Fayetteville*, 121 N. C. 207, following *Richmond & D. R. Co. v. Reidsville*, 109 N. C. 494.

¹ See *Chicago, R. I. & P. R. Co. v. Independent Dist.*, 99 Iowa 556; *Barrett v. Shannon*, 19 Mont. 397; *Pelton v. Bemis*, 44 Ohio St. 51; *Centennial Eureka Mining Co. v. Juab County*, 22 Utah 395; *Wyckoff v. King County*, 18 Wash. 256.

² *Dow v. Sudbury*, 5 Met. 73; *Shaw v. Beckett*, 7 Cush. 442; *Raleigh v. Salt Lake City*, 17 Utah 130. And see *Inglee v. Bosworth*, 5 Pick. 498, per *Morton, J.*; *Ware v. Percival*, 61 Me. 391, per *Appleton, Ch. J.* Proof of illegal and void additions to the assessment, increasing plaintiff's taxes, is not enough to enable him to recover back if it appears that had he made a truthful return of his property he would have been properly taxed for the whole or a part of the illegal tax: *Day v. Pelican*, 94 Wis. 503.

³ *De Fremery v. Austin*, 53 Cal. 380; *Lake Superior Ship Canal, etc. Co. v. Thompson*, 56 Mich. 493; *Torrey v. Millbury*, 21 Pick. 64. See the latter case commented

on in *Lincoln v. Worcester*, 8 Cush. 55. And see, as supporting it, *Avery v. East Saginaw*, 44 Mich. 587. In *Farmers' & M. Bank v. Vandalia*, 57 Ill. App. 681, it was held that plaintiff in an action to recover the amount paid as illegal taxes, under a count for money had and received, can recover only so much as he can show defendant ought to retain. It was held in *Solomon v. Oscoda T'p*, 77 Mich. 365, that where there had been a deliberate omission, from the assessment, of all of certain kinds of personalty in the township, and where the assessor testified that he intended to assess the property upon his roll at only one-fourth of its cash value, the owner of assessed personalty need not, in an action to recover the amount by which his assessment was excessive, make the usual proof of the actual value of his property; it being impossible to separate the legal from the illegal items.

⁴ *Savings & L. Soc. v. San Francisco*, 131 Cal. 356. But see *Boston & M. R. v. State*, 63 N. H. 571.

⁵ See *Boston, etc. Glass Co. v. Boston*, 4 Met. 181; *Mills v. Lowell*, 159 Mass. 383; *Atwell v. Zeluff*, 26 Mich. 118, 120; *Amoskeag Manuf. Co. v. Manchester*, 70

paid are not recoverable back,¹ though if the suit were brought against the officers in a proper case, it would be otherwise.² The burden of showing illegalities is on the party who counts upon them.³

Torts by officers. Where a collector is guilty of a distinct tort which his warrant if valid would not justify, the municipal corporation for which he assumes to act cannot be held responsible therefor. Illustrations are where he seizes the goods of a taxpayer, or arrests him to compel a second payment of the tax which has already been fully paid,⁴ and where on a warrant against one man he seizes the goods of another.⁵ In New York a town is not liable for any mistake or misfeasance of the assessor or collector by means whereof one has been compelled to pay a tax wrongfully levied, the money not having been paid into the treasury of the town. These officers are not, in a legal sense, the agents of the town in its corporate capacity, in performing duties under the tax-laws of that state.⁶ In Mas-

N. H. 336; Southern R. Co. v. Greenville, 49 S. C. 449; Galveston County v. Galveston Gas Co., 72 Tex. 509.

¹ Briggs v. Lewiston, 29 Me. 472. See Dow v. Sudbury, 5 Met. 73; Shaw v. Becket, 7 Cush. 442.

² Shaw v. Becket, 7 Cush. 442.

³ Douglasville v. Johns, 62 Ga. 423; Davis v. Otoe County, 55 Neb. 677; Bankers' Life Assoc. v. Board of Com'rs, 61 Neb. 202; Warwick, etc. Water Co. v. Carr (R. I.), 52 Atl. Rep. 1030.

⁴ Liberty v. Hurd, 74 Me. 101. If land is sold after payment of the tax the sale is void, and the owner, if he redeems, pays money voluntarily and cannot recover it from the county: Morris v. Sioux County, 42 Iowa 416; Sears v. Marshall County, 59 Iowa 603.

⁵ Wallace v. Menasha, 48 Wis. 79. When one is illegally assessed a tax afterwards abated, and is ar-

rested by the collector, the payment by the town to the collector of the cost of the arrest is not such a ratification of the act as to render the town liable: Perley v. Georgetown, 7 Gray 464.

⁶ Lorillard v. Monroe, 11 N. Y. 392, 12 Barb. 161; People v. Zundel, 157 N. Y. 513. And see People v. Chenango Supervisors, 11 N. Y. 563; Chapman v. Brooklyn, 40 N. Y. 372; Newman v. Livingston Supervisors, 45 N. Y. 676; Rochester v. Rush, 80 N. Y. 302; Preston v. Boston, 12 Pick. 7. Compare Dawson v. Aurelius, 49 Mich. 479. The case of Rochester v. Rush, *supra*, holds that as towns in New York have no treasury as cities and counties have, they are not liable for illegal taxes collected by the town officers. But the board of supervisors may refund such taxes and require the sums to be raised by the town as shall be just.

sachusetts an action lies against a town for the acts of its assessors in causing the arrest of one for a tax for which he was not liable by reason of his non-residence; the assessors having acted in good faith and not being themselves by law liable.¹ And probably municipal corporations in New York and other states, which exist under special charters, would be held liable for the wrongs of their officers in some cases where towns would not be, on the ground that by accepting the charter they had undertaken with the public for the proper performance of the municipal duties created thereby.²

Implied warranty. A municipal corporation or body, for whose benefit taxes are enforced, does not warrant to the purchaser the title to property sold for their satisfaction, or the legality of the proceedings on which the sale was based. The purchaser in such a case buys at his own risk, and at his peril investigates the proceedings. This is a general rule in tax-sales.³

Misappropriations. A misapplication by a corporation, actual or threatened, of moneys collected by taxation, will give no right of action to an individual to recover his proportion of the tax. The money, when collected and paid to the corporation, belongs to it, and not to those from whom it has been collected. For misapplication there may be remedies on behalf of the public and of individual taxpayers; but a suit to recover the moneys must be based upon an individual right to it, which could not exist in the case.⁴

¹ *Alger v. Eaton*, 119 Mass. 77, distinguishing *Durant v. Eaton*, 98 Mass. 469.

² *Howell v. Buffalo*, 15 N. Y. 512. See *Conrad v. Ithaca*, 16 N. Y. 158; *Weet v. Brockport*, 16 N. Y. 161, note; *Bennett v. Buffalo*, 17 N. Y. 383; *Sheldon v. Kalamazoo*, 24 Mich. 383.

³ *Logansport v. Humphrey*, 84 Ind. 467; *Lyon County v. Goddard*, 22 Kan. 389; *Packard v. New Limerick*, 34 Me. 266; *Lynde v. Melrose*, 10 Allen 49. In some states

it is otherwise by statute. See *Saulters v. Victory*, 35 Vt. 351; and compare *School District v. Allen County*, 22 Kan. 568.

⁴ *Withington v. Harvard*, 8 Cush. 66; *Wright v. Dunham*, 13 Mich. 414; *Moore v. School Directors*, 59 Pa. St. 232. A tax on corporate dividends cannot be disputed by creditors of the corporation on the ground of its having been declared when the corporation was insolvent: *Pennsylvania Bank Assignee's Account*, 39 Pa. St. 103.

Federal liability. The United States are liable for taxes illegally levied and collected, by suit in the court of claims, but only under the conditions prescribed in the acts of congress providing for such suits.¹

Remedy by replevin. In some cases, one whose goods have been seized for the satisfaction of a tax may recover them by writ of replevin. But to justify this process the tax must be absolutely void, and not merely unjust, excessive, or irregular. The case must consequently be brought within the rules already laid down, regarding the invalidity of tax levies, or the suit in replevin must fail.² The liability of this process to vexatious use is so considerable, that it has been deemed proper in some of the states, on grounds of public policy, to provide that replevin shall not lie for property distrained for taxes. Taking away this remedy would still leave to the party all the other remedies which are applicable to the case; and he may therefore still contest the validity of the tax in a suit to recover the money after it has been paid, or in an action to recover the value of his goods, if the tax was collected by distress and sale.³ And it has been held that a statute taking away the

¹ See *United States v. Savings Bank*, 104 U. S. 728.

² *Hill v. Wright*, 49 Mich. 229. If the tax-list and warrant are regular, and only the tax erroneous, and an opportunity for correction has been given, replevin will not lie: *Buell v. Schaale*, 39 Iowa 293. Replevin will not lie for property seized for an excessive tax by a collector, if he was the proper officer to make the levy: *Mowrer v. Helferstine*, 80 Mo. 23. Replevin will lie for property taken on a valid warrant if the seizure was made out of the jurisdiction: *McKay v. Batchellor*, 2 Colo. 591.

³ *Macklot v. Davenport*, 17 Iowa 379; *Dudley v. Ross*, 27 Wis. 679. The Michigan statute forbidding replevin for property taken by virtue of any warrant for the collection of any tax, assessment, or

fine, in pursuance of any statute of the state, precludes the action's lying to test the validity of any tax: *Roberts v. Denio*, 118 Mich. 544. It covers a case where property is seized for a tax which appears on the roll to be regularly assessed in a township where it was subject to be assessed, and which is presumably valid, though in fact the assessor has made an unauthorized change in the assessment roll in regard to the property: *Hill v. Graham*, 72 Mich. 659. Replevin will not lie in Michigan to recover property seized for a tax under a warrant fair on its face, and where the person against whom the officer proceeded is the one against whom the warrant was directed: *Forster v. Brown*, 119 Mich. 86; *Northwestern Co. v. Scott*, 123 Mich.

remedy by replevin is not applicable where no jurisdiction existed to assess or levy the tax;¹ nor is it to be held applicable to a third person whose goods are seized for a tax for which he was in no way liable,² or to one who was not liable to be assessed for taxation.³

Where replevin is allowed, it cannot be maintained by the person taxed unless the whole tax is illegal; as it must assume that the seizure of the goods was without warrant of law.⁴

Estoppel. It sometimes happens that a party who complains of illegal taxation has been so connected with the proceedings in voting, laying, or collecting the same, that it would be unjust and inequitable to others or to the public that any remedy should be given him in respect to the illegality. Such a case would exist if one in respect of some interest of his own should petition for or otherwise actively encourage the levy of the tax

357. In replevin for partnership property seized for taxes assessed against one of the members of the firm, evidence that parts of the tax were assessed illegally is not admissible: *Fletcher v. Post*, 104 Mich. 424. Under the Michigan statute if the property was taken under a tax-warrant for taxes partly legal the right of replevin for any of the property is defeated: *Boyce v. Stevens*, 86 Mich. 549.

¹ *Hood v. Judkins*, 61 Mich. 575. Where a board of supervisors charged with the correction and assessment of assessment rolls adjudges property exempt from taxation to be taxable, the owner is not precluded thereby from asserting his title to such property at any time: *Meridian v. Phillips*, 65 Miss. 362.

² *Traverse v. Inslee*, 19 Mich. 98. Compare *Atlantic, etc. R. Co. v. Cleino*, 2 Dill. 175; *Cardinel v. Smith*, Deady 197. The contrary is held in Illinois, where trespass or trover is held to be the proper

remedy: *Vocht v. Reed*, 70 Ill. 491; or injunction: *Deming v. James*, 72 Ill. 78.

³ *Stockwell v. Vietch*, 15 Abb. Prac. 412. See *Ross v. East Saginaw*, 18 Mich. 233. As to such statutes in general, see *Cody v. Lennard*, 45 Ga. 85; *Yancey v. New Manchester, etc. Manuf. Co.*, 33 Ga. 622; *McClaghry v. Cratzenburgh*, 39 Ill. 117; *Mt. Carbon, etc. R. Co. v. Andrews*, 53 Ill. 176; *O'Reiley v. Good*, 42 Barb. 521. When mere irregularities are complained of, replevin will not be the appropriate remedy: *Buell v. Ball*, 20 Iowa 282; *Bibo v. Henderson*, 21 Iowa 56, and cases cited; *Gerry v. Herrick*, 87 Me. 219.

⁴ *Emerick v. Sloan*, 18 Iowa 139; *Boyce v. Stevens*, 86 Mich. 549; *Fletcher v. Post*, 104 Mich. 424; *Brackett v. Whidden*, 3 N. H. 17. See as to this remedy in tax cases, *Enos v. Bemis*, 61 Wis. 656. The affidavit in replevin that the property is not taken for a tax is not conclusive: *Kaehler v. Dobberpuhl*, 60 Wis. 256.

or assessment of which subsequently he makes complaint.¹ To quote from a decision recently made by the supreme court of Indiana: "It is a general rule, now fully accepted in this state, that where the owner of property subject to assessment for

¹ *Murdock v. Cincinnati*, 44 Fed. Rep. 726; *Weber v. San Francisco*, 1 Cal. 455; *Irvin v. Gregory*, 86 Ga. 605; *Peoria v. Kidder*, 26 Ill. 351; *Lafayette v. Fowler*, 34 Ind. 140; *Rickets v. Spraker*, 77 Md. 371; *Carroll County v. Graham*, 98 Ind. 279; *Richcreek v. Moorman*, 14 Ind. App. 370; *Patterson v. Baumer*, 43 Iowa 477; *Sleeper v. Bullen*, 6 Kan. 300; *Ritchie v. South Topeka*, 38 Kan. 368; *Stewart v. Commissioners*, 45 Kan. 708; *Commissioners v. Arnold*, 49 Kan. 279; *Covington v. Nadaud*, 103 Ky. 455; *Andrus v. Board of Police*, 41 La. An. 697; *Demarais v. Board of Police*, 42 La. An. 799; *Dupré v. Board of Police*, 42 La. An. 802; *State v. Tax Collector*, 104 La. 468; *Pease v. Whitney*, 8 Mass. 93; *Tash v. Adams*, 10 Cush. 252; *Motz v. Detroit*, 18 Mich. 495; *Warren v. Grand Haven*, 30 Mich. 24; *Byram v. Detroit*, 50 Mich. 56; *Harwood v. Huntoon*, 51 Mich. 639; *Conde v. Schenectady*, 164 N. Y. 258; *Kellogg v. Ely*, 15 Ohio St. 64; *State v. Mitchell*, 31 Ohio St. 592; *In re Broad St.*, 165 Pa. St. 475; *Barlow v. Tacoma*, 12 Wash. 32; *Wingate v. Tacoma*, 13 Wash. 603; *Tacoma Land Co. v. Tacoma*, 15 Wash. 133; *Seattle v. Hill*, 23 Wash. 92. One cannot maintain *assumpsit* to recover taxes paid which, as a member of the board of supervisors, he voted to impose: *Wood v. Norwood*, 52 Mich. 32. If one was present at a taxpayers' meeting held in pursuance of a defective notice, and recorded a motion to

bind the district, he is estopped, when a tax is levied to pay the bonds, from questioning the regularity of the meeting: *Thatcher v. People*, 98 Ill. 632. One who has listed property for taxation as his own instead of as belonging to the corporation of which he was manager, cannot have collection against himself restrained: *McGillin v. Chase*, 39 Neb. 422. Taxpayers who placed valuations on their property for taxation held estopped from questioning such values: *Tampa v. Mugge*, 40 Fla. 326. Where a board of equalization increased the assessment of property under the classification in which it was returned by the owner, the latter was estopped from complaining that such personalty was classified improperly: *Faribault Water Works Co. v. County Com'rs*, 44 Minn. 12. Although property is assessed in the name of one not the owner, yet if the latter pays the tax due thereon he will be estopped from disputing the correctness of the assessment: *Scholefield v. West's Succession*, 44 La. An. 277. Where a corporation has returned to the assessors an account of its realty and personalty, the valuation whereof on the assessment roll does not exceed the amount so returned, it is estopped from seeking to avoid the roll on the ground that such roll does not show that the assessment was limited to the kinds of personalty specified by the statute: *Mowry v. Slatersville Mills*, 20 R. I. 94. Where by

public improvements stands by and makes no objection to such improvements, which benefit his property, he may not deny the authority by which the improvements are made, or defeat the assessment made against his property for the benefits derived; and this is true both where the proceedings for the improvement are attacked for irregularity, and where their validity is denied, but color of law exists for the proceedings.”¹

mistake of fact one has listed for taxation realty not within the taxing district, he is not thereby estopped from seeking to have collection restrained: *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369. As to the estoppel based upon bank's return for assessment, see *Wilmington v. Ricaud*, 90 Fed. Rep. 214, 32 C. C. A. 580; *Winfield Bank v. Nipp*, 47 Kan. 744; *Hamacker v. Commercial Bank*, 95 Wis. 359. Those who have invoked and who have participated in proceedings under an unconstitutional statute for the improvement of a road, are estopped from enjoining the collection of an assessment for the payment of the costs incurred, but no such estoppel arises as to enjoining further proceedings under the act: *Mott v. Hubbard*, 59 Ohio St. 199. Where, before the passage of an ordinance which provided for paving at the cost of abutting owners, one opposed paving the street with stone, expressing a preference for brick, he was not estopped from asserting that an ordinance providing for a brick pavement was invalid because not passed by the requisite number of votes: *Bradford v. Fox*, 171 Pa. St. 343. As to the estoppel against abutting owners who had entered into a contract with the superintendent of streets to have improvement work done, from questioning the validity of the con-

tract on which the assessment was based, see *Union Paving, etc. Co. v. McGovern*, 127 Cal. 638.

¹ *Board of Com'rs v. Plotner*, 149 Ind. 116, citing the following Indiana cases: *Palmer v. Stumph*, 28 Ind. 329; *Hellenkamp v. Lafayette*, 30 Ind. 192; *Evansville v. Pfisterer*, 34 Ind. 36; *Lafayette v. Fowler*, 34 Ind. 140; *Muncey v. Joest*, 74 Ind. 409; *Logansport v. Uhl*, 99 Ind. 531; *Peters v. Griffiee*, 108 Ind. 121; *Taber v. Ferguson*, 109 Ind. 227; *Ross v. Stackhouse*, 114 Ind. 200; *Prezinger v. Harness*, 114 Ind. 491; *Western Paving, etc. Co. v. Citizens' Street R. Co.*, 128 Ind. 525; *McCoy v. Able*, 131 Ind. 417; *Vickery v. Board*, 134 Ind. 554; *Cluggish v. Koons*, 15 Ind. App. 599. And see to the same effect, *Wight v. Davidson*, 131 U. S. 371; *Girkin v. Simon*, 116 Cal. 604; *Flora v. Cline*, 89 Ind. 208; *Clements v. Lee*, 114 Ind. 397; *Montgomery v. Wasem*, 116 Ind. 343; *Jenkins v. Stetler*, 118 Ind. 275; *De Pauw Plate Glass Co. v. Alexandria*, 152 Ind. 443; *Crawfordsville Music Hall Assoc. v. Clements*, 12 Ind. App. 464; *Busenbark v. Clements*, 22 Ind. App. 557; *Robinson v. Burlington*, 50 Iowa 240; *Muscatine v. Chicago, R. I. & P. R. Co.*, 78 Iowa 645; *Sleeper v. Bullen*, 6 Kan. 300; *Covington v. Nadaud*, 103 Ky. 455; *Towne v. Newton City Council*, 169 Mass. 240; *Hall v. Sta- baugh*, 69 Mich. 484; *Lundbom v.*

Some of the cases go very far in the direction of holding that a mere failure to give notice of objections to one who, with the knowledge that the person taxed, as contractor or otherwise, is expending money in reliance upon payment from the taxes,

Manistee, 93 Mich. 170; Goodwillie v. Detroit, 103 Mich. 283; Atwell v. Barnes, 109 Mich. 10; Fitzhugh v. Bay City, 109 Mich. 581; Smith v. Carlow, 114 Mich. 67; Walker T'p v. Thomas, 123 Mich. 296; Gibson v. Owens, 115 Mo. 258; Parker v. Omaha, 16 Neb. 269; Frevert v. Bayonne, 63 N. J. L. 202; Ashton v. Rochester, 133 N. Y. 187; People v. Many, 89 Hun 138; Wilson v. Salem, 24 Or. 504; Bidwell v. Pittsburgh, 85 Pa. St. 412. *Contra*, Starr v. Burlington, 45 Iowa 87; Wright v. Thomas, 26 Ohio St. 346; Wright v. Tacoma, 3 Wash. Terr. 410. Where the objection is jurisdictional the failure to object before part or the whole of the improvement is completed does not work an estoppel: Keese v. Denver, 10 Colo. 112; Coggeshall v. Des Moines, 78 Iowa 235; App v. Stockton, 61 N. J. L. 520; Strout v. Port Huron, 26 Or. 294; Smith v. Minto, 30 Or. 351. Acquiescence by an abutting owner cannot be invoked by a city in support of an assessment for street work levied in a manner not authorized by law: New Whatcom v. Bellingham Bay Imp. Co., 10 Wash. 378. In Fox v. Middlesborough Town Co., 96 Ky. 262, it was held that a lot-owner was not estopped by the mere fact that he witnessed the entire progress of an improvement upon a street in front of his lot, from disputing the lien on his lot for the cost on the ground that the charter provisions in regard to creating such liens were not strictly complied with. A

street having been paved under a council resolution that the expense should be divided among the property owners benefited, a railroad company having a track in the street was not estopped by acquiescing in the work, from denying liability for paving between its tracks under an ordinance long before passed, the company not having had notice that the work was doing under the ordinance and at its expense: People v. Coffey, 66 Hun 160, 21 N. Y. Supp. 34. Where the council has directed that a street improvement ordered by it shall be paid out of the general fund, a property owner benefited by the improvement and who stands by and permits the work to be done without objection, is not estopped from contesting the validity of an assessment subsequently made by the council, of the cost against the property: Spaulding v. Baxter, 25 Ind. App. 485. A property owner's failure to object to an improvement does not, in the absence of anything tending to charge him with notice that the city intended to charge him therefor, estop him from disputing his liability: Winnebago Furn. Manuf. Co. v. Fond du Lac County (Wis.), 88 N. W. Rep. 1018. In Nebraska it has been held that a taxpayer is not estopped, unless he is guilty of laches, from resisting a tax because he has suffered the work to proceed instead of complaining: Hutchinson v. Omaha, 52 Neb. 345. Delay in suing to restrain the collecting of

may have the same effect.¹ But the technical doctrine of estoppel is one to be applied with great caution, for it sets aside general rules on supposed equities, and the danger is always imminent that wrong may be done. The following decisions have been made: One who petitions for an improvement is not estopped from denying the validity of the assessment therefor on the ground that the statute was not complied with in making the improvement.² One is not estopped from seeking re-

assessments for opening a street until other owners have paid their assessments, does not of itself estop plaintiffs from maintaining such suit: *Speir v. New Utrecht*, 121 N. Y. 420.

¹ See the cases cited in the opening of the note just preceding.

² *McLauren v. Grand Forks*, 6 Dak. 397; *Strout v. Portland*, 26 Or. 294. By signing a petition for paving a street an abutting owner does not waive his right to attack the levy and assessment because of the city's non-compliance with statutory requirements in making the levy after the completion of the improvement: *Wakeley v. Omaha*, 58 Neb. 245. A petition by abutting owners must be understood as asking that the work be done in accordance with the charter and ordinances; if not so done they are not estopped from refusing to pay for it: *Ardrey v. Dallas*, 13 Tex. Civ. App. 442. A charter provision that assessment proceedings shall be binding upon those who petition for the improvement, and who, although given an opportunity to appear and object to the proceedings or assessment, fail to do so, estops them from objecting afterwards to such assessment only when the proper methods are employed, and not when the methods are such as to render the assessment unequal and unconstitu-

tional: *Howell v. Tacoma*, 3 Wash. St. 311. By petitioning for an improvement, or by acquiescing in the construction of it, and thereby consenting to the raising of part of its cost by assessment on all abutting property, one is not estopped from suing to enjoin the excess above the legal limit of an assessment. He binds his property for the payment of its proper share of a legal assessment for the cost of a public improvement, but no further: *Birdseye v. Clyde*, 61 Ohio St. 27. Where an owner unites with others in a petition for an improvement stating the number of feet his property abuts on the street, he is not estopped from urging that he has a less number of feet subject to assessment: *Cincinnati v. Manss*, 54 Ohio St. 257. Petitioners for an improvement are not estopped from denying the validity of an assessment to pay for an improvement different from that petitioned for, and much more costly: *Watkins v. Griffith*, 59 Ark. 344. By petitioning that a street be paved with cedar blocks, an owner is not estopped from denying liability for his proportionate share of the cost of a macadamized pavement: *Winnebago Furn. Manuf. Co. v. Fond du Lac County (Wis.)*, 88 N. W. Rep. 1018. It is held, in *Batty v. Hastings (Neb.)*, 88 N. W. Rep.

straint of a street assessment by the fact that he has before paid a similar assessment.¹ The mere fact that one knows work is doing for which an unconstitutional tax is to be laid will not estop him from objecting after the work is done.² That a taxpayer requires work to be done in accordance with the contract made with the city is no ground of estoppel from disputing the validity of the ordinance under which the work is done.³ The receipt by one whose property is sold under a void warrant or for an illegal tax of the surplus moneys on the sale is not a condonation of the trespass.⁴ If some of several tenants in common of land which a collector is selling are present and waive certain defects in the proceedings, this will not estop others not present from insisting on the illegality of the sale.⁵ Other cases are referred to in the margin.⁶

139, that no estoppel from asserting the invalidity of a special assessment arises from the mere fact that one was a petitioner for the improvement in question.

¹ Tallant v. Burlington, 39 Iowa 543. See Robinson v. Burlington, 50 Iowa 240. Where an assessment roll is invalid because approved without taxpayers having opportunity to object, one who pays for one year the taxes based thereon is not estopped the next year from asserting it to be invalid: Farasworth Lumber Co. v. Fairley (Miss.), 28 South. Rep. 569. By paying an assessment against his land for the construction of a drain one is not estopped from showing, as to a subsequent assessment for repairing the drain, that the land is not benefited: Parke County Coal Co. v. Campbell, 140 Ind. 28. By paying one or more instalments of a special assessment one is not precluded from resisting the collection of the others: Upton v. People, 176 Ill. 632; Wakeley v. Omaha, 58 Neb. 245. It was held in Hodding v. New Orleans, 48 La.

An. 982, that paying state taxes based on a supplemental assessment roll provided to supply omissions or correct errors in the original roll would preclude the owner from alleging want of notice of the supplemental assessment when called on to pay city taxes levied thereon. By tendering the amount supposed to be justly due one is not estopped from denying the validity of a tax levy: State v. Hannibal & St. J. R. Co., 110 Mo. 265.

² Wright v. Thomas, 26 Ohio St. 346; Lewis v. Symmes, 61 Ohio St. 471.

³ Perkinson v. McGrath, 9 Mo. App. 26.

⁴ Westfall v. Preston, 49 N. Y. 349.

⁵ Reed v. Crapo, 127 Mass. 39.

⁶ Where an assessment roll is void because not made in time, the assessor is held not estopped from objecting to a tax levied against himself thereon: Fletcher v. Trewalla, 60 Miss. 963. One who has not paid either a municipal assessment or the subsequent re-assessment will not be heard

One whose property has been included in a city boundary on his petition is estopped from denying the city's right to tax it on the ground that it does not receive its full measure of the benefits of city government.¹ So one may be estopped by

to deny the validity of the re-assessment on the ground that the original assessment was valid: *Port Angeles v. Lauridsen* (Wash.), 66 Pac. Rep. 403. A shareholder in a national bank at whose request an assessment against the bank's surplus has been taken from the rolls and distributed among the individual shareholders is estopped from denying that such assessment is legal: *People v. Button*, 63 Hun 624, 17 N. Y. Supp. 315. If a trustee required to pay a beneficiary the interest on the trust fund retains from the beneficiary the amount of the taxes for several years under the pretext that they are valid, and that he will pay them, he is estopped from disputing their validity: *Thiebaud v. Tait*, 138 Ind. 238. Payment of tax ratified by accepting interest less tax deducted: *Baltimore v. Hussey*, 67 Md. 112. Where property owners had acquiesced in a partial assessment for local improvements provided for by a statute which prescribed the territory benefited and the basis for assessment, they were estopped from contesting on grounds available when the first assessment was made, the final assessment authorized by the same statutory provision, covering the same territory and made on the same basis: *State v. District Court*, 61 Minn. 542. Appearing to protest against the improvement of a certain street cannot estop one from disputing the right of town trustees to improve an-

other street not embraced in the proceedings protested against, though thereafter an attempt was made to embrace it therein: *Stephenson v. Salem*, 14 Ind. App. 386. To resist paying an assessment for improving a street, one cannot set up title in himself in the street after the work is done, when he was aware that the prior owner had undertaken to dedicate the land to street purposes, and with that knowledge suffered the work to go on without objection: *Neff v. Bates*, 25 Ohio St. 169. Under a city charter it was held that a property owner was not estopped from contesting a paving assessment in the city court, because of his failure to raise the objection in the city council: *City Council v. Birdsong*, 126 Ala. 632. One contesting a drainage proceeding, but admitting before the supervisors that the land is swamp and overflowed, is estopped from disputing that fact on *certiorari*: *Hagar v. Yolo Supervisors*, 47 Cal. 222. It was held in *Medical Lake v. Smith*, 7 Wash. 195, that when a street grading assessment is invalid the town cannot assert an estoppel against a lot-owner who refuses to pay his assessment. If such estoppel exists it can be enforced only by those who actually did the grading. For cases raising questions of estoppel in tax proceedings, see *Mulligan v. Smith*, 59 Cal. 206; *Cameron v. Stephenson*, 69 Mo. 372; *Matter of Woolsey*, 95 N. Y. 135.

¹ *Lebanon v. Edmonds*, 101 Ky. 216. To the same effect: *Seward*

long acquiescence from disputing the legality of an annexation to a city.¹

The doctrine of estoppel applies against municipalities as well as against individuals. Where a county has taxed land as belonging to a person, it cannot, in a suit brought by him to enjoin the tax, deny his ownership.² If a town has voted railroad aid it cannot, two years afterwards, during which time the railroad has gone on to complete its road, raise the question of the sufficiency of the notice of meeting at which the aid was voted.³ If a county assesses taxes on lands and sells them for delinquency, it will be estopped from asserting title to them in itself.⁴

Remedy by mandamus. A summary remedy by the writ of *mandamus* may be had by parties illegally assessed in a few cases, which are more particularly referred to in another chapter.⁵ They embrace cases in which the property or subject taxed is not taxable by law, and the remedy is given by com-

v. Rheiner, 2 Kan. App. 95; Kuhn v. Port Townsend, 12 Wash. 605.

¹ Logansport v. La Rose, 99 Ind. 117; Strosser v. Fort Wayne, 100 Ind. 443; De Pauw Plate-Glass Co. v. Alexandria, 152 Ind. 443. The legal validity of a corporation *de facto* will not be inquired into in a tax case: Coe v. Gregroy, 53 Mich. 19. And see *ante*, p. 8. Nor of a town plat which has long been acted upon: Bryant v. Estabrook, 16 Neb. 217.

² Brandirff v. Harrison County, 50 Iowa 164.

³ Burlington & M. R. Co. v. Stewart, 39 Iowa 267; Lamb v. Railroad Co., 39 Iowa 333. But where city property is assessed by city officers and sold as individual property, this does not estop the city from setting up its title: St. Louis v. Gorman, 29 Mo. 593. Taxing lots as private property whose boundaries include part of what

is actually used as a street does not estop the city from claiming it as a street: Ellsworth v. Grand Rapids, 27 Mich. 250.

⁴ Austin v. Bremer County, 44 Iowa 155. But a mere levy of taxes is not enough: Page County v. Burlington & M. R. Co., 40 Iowa 520. A receipt of a certain sum in compromise of the taxes might be: Adams County v. Burlington & M. R. Co., 39 Iowa 507. See the doctrine limited in Buena Vista County v. Railroad Co., 46 Iowa 226. A county is not estopped from levying a tax on land by the fact that at the time it is bringing an action against the owner to set aside fraud in the conveyance of the land to him: American Emigrant Co. v. Railroad Co., 52 Iowa 323. Further as to estoppel, see *ante*, pp. 444, 809, 810.

⁵ See *ante*, pp. 1355, 1367, 1369.

PELLING the proper officer to strike off the assessment or to discharge the tax.¹ But an excessive assessment is not to be corrected by means of the writ, it not lying to correct mere errors of judgment in the exercise of judicial or discretionary powers.² *Mandamus* to an officer to prevent an illegal diversion of taxes will not be granted before the taxes are assessed.³

A remedy by prohibition. The common-law writ of prohibition lies to keep inferior courts within their jurisdiction, and it is inapplicable to tax cases, except, perhaps, under very peculiar statutes. A statutory remedy under this name has been given in some states.⁴ It has been held that an existing remedy by prohibition to stay the collection of taxes illegally assessed may constitutionally be abrogated by the legislature.⁵ In proceedings against a county court to prohibit it from reducing the amount of taxes assessed against a railroad company, the company is a necessary party.⁶

Quo warranto. This is the process by means of which usurpations of corporate franchises may be inquired into. It may doubtless be made available on behalf of the state in some cases where powers of taxation are unlawfully claimed, but is not adapted to the redress of individual wrongs under the revenue laws. It has been held not to be the proper process to

¹ See *ante*, p. 1358. A statute which forbids any court to grant any order or writ staying or preventing the collection of taxes, or the taking of any steps in the collection thereof by any officer of the state charged with a duty in the collection of taxes, does not prevent ordering a county auditor to correct his tax-list and tax-duplicates by deducting the amount of an unauthorized increase in the valuation of personalty: *State v. Cromer*, 35 S. C. 213.

² *Gibbs v. Hampden County Com'rs*, 19 Pick. 298; *Miltenerberger v. St. Louis County Court*, 50 Mo. 172; *Manchester v. Furnald* (N.

H.), 51 Atl. Rep. 657; *Howland v. Eldredge*, 43 N. Y. 457; *School Directors v. Anderson*, 45 Pa. St. 388.

³ *State v. Hunter* (Wis.), 87 N. W. Rep. 485.

⁴ See *Talbot v. Dent*, 9 B. Monr. 526; *People v. Queens Supervisors*, 1 Hill 195; *State v. Gary*, 33 Wis. 93. If legal and illegal taxes are so blended that they cannot be distinguished, a prohibition may go for the whole: *State v. Hodges*, 4 Rich. 256. See *Hebard v. Ashland County*, 55 Wis. 145.

⁵ *State v. Gurney*, 4 S. C. 520.

⁶ *Armstrong v. County Court*, 15 W. Va. 190.

correct corporate action, where a city, instead of establishing remunerative water rates to pay the interest and part of the principal of the water loan — which it was claimed was its duty to do annually — established nominal rates only, and levied a tax on the city at large to pay the debt and interest.¹

Conclusion. It will be apparent from what has appeared in this chapter, that many serious errors may be committed and many wrongs done in the exercise of the power to tax, which the parties wronged must submit to, because the law can afford them no redress whatever. All injuries which result from an exercise of political or legislative authority are to be included in this category; and these are often the most serious which, in matters of taxation, the people are visited with. In all such cases, the authority of the judiciary is confined to an inquiry into the jurisdictional question, and if it appears that the political or legislative body has kept within the limits of its authority, the judiciary must pause there, and admit its incompetency to inquire into wrongs which, within those limits, may have been committed.² The wrongs which spring from errors on the part of assessors are, in a large proportion of all the cases, as little susceptible of correction, unless the legislature shall have provided a remedy by statute. Courts of equity have but a limited jurisdiction, extending to few cases besides those in which the impelling motive on the part of the assessors has been to do injustice and inflict injury. The chief protection of the citizen must at last be sought in the intelligence and integrity of public officers, and where these fail, as too often they do, the injury must frequently prove irreparable.

¹ *Attorney-General v. Salem*, 103 Mass. 138. Neither is a bill in equity the proper remedy for such a case: *Carleton v. Salem*, 103 Mass. 141. See *Brennan v. Bradshaw*, 53 Tex. 330. Where one claims that his land is illegally included within the boundary of a village (and thus made taxable therein) *quo warranto* is the

proper remedy: *State v. Dimond*, 44 Neb. 154; *State v. Mote*, 48 Neb. 683.

² The judiciary has no general authority to correct injustice in legislative action in matters of taxation: *Pence v. Frankfort*, 101 Ky. 534; *Louisville & N. R. Co. v. Barboursville* (Ky.), 48 S. W. Rep. 985.

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